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at its

(SIXTY-FIFTH ANNUAL MEETING) ✓

WASHINGTON, D. C.

APRIL 29-MAY 1, (1971) ✓



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# AMERICAN JOURNAL OF INTERNATIONAL LAW

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PROCEEDINGS OF THE SIXTY-FIFTH ANNUAL MEETING OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW  
WASHINGTON, D. C., APRIL 29-MAY 1, 1971

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**SIXTY-FIFTH ANNUAL MEETING  
OF  
THE AMERICAN SOCIETY OF INTERNATIONAL LAW**

**THE STATLER-HILTON HOTEL, WASHINGTON, D. C.**

**STRATEGIES FOR WORLD ORDER**

**FIRST SESSION**

**Thursday, April 29, 1971, at 10:30 a.m.**

**Chinese Participation in the United Nations**

The session convened at 10:30 o'clock a.m. in the Congressional Room of the Statler-Hilton Hotel, the Honorable Dean Rusk of the University of Georgia School of Law presiding.

CHAIRMAN RUSK welcomed the participants and the guests. He noted that in view of the recent developments, the consideration of Chinese participation in the United Nations had become even more urgent, although it might be considered controversial under present circumstances to refer to it as an important question.

THE CHAIRMAN then introduced the speakers, Professor Jerome Cohen of Harvard Law School, Professor Richard Goodman of the University of Alabama School of Law, S. H. Tan, Esq., Adviser to the Embassy of the Republic of China to the United States, Professor Lung-chu Chen of Yale Law School, and Professor William Bundy of Massachusetts Institute of Technology. Chairman Rusk invited Professor Cohen to begin.

**CHINESE PARTICIPATION IN THE UNITED NATIONS:  
CHANGING REALITIES AND THE IMPERATIVES  
OF NEW POLICY**

*By Jerome Alan Cohen \**

Last November, for the first time, a majority of the United Nations General Assembly voted in favor of the so-called Albanian resolution to replace the Nationalist representatives of China with Communist representatives. No change was then made because, as in the past, a majority also voted in favor of an American-sponsored resolution declaring Chinese representation an "important question" requiring a two-thirds vote for adoption of any change. Yet there is now an increasing expectation that before long the "important question" resolution will fail. Such stalwart American allies

\* Harvard Law School.

as Britain and Canada have already hinted that they may no longer support this tactic. A simple majority may therefore be able to decide the Chinese representation issue insofar as the General Assembly is concerned. If so, Peking's delegates are likely to replace Taipei's in the Assembly, unless the United States comes up with an effective new stratagem.

Although it has long been fashionable, at least in private, for many American diplomats to minimize the significance of the United Nations, and although the current crisis over China's representation has plainly been creeping up for some time, the fact that the time for decision is genuinely upon us has come as a rude shock to our foreign policy establishment. Yet shock can be therapeutic. In this case it has stimulated the United States Government to reappraise both its over-all policy toward China and its specific policy on what in bureaucratic parlance is called the "Chi-rep" question. While that process of reappraisal is under way, it is appropriate that we meet here to engage in our own deliberations about how to deal with the problems involved in a manner that will further both the national interest and that of the world community.

The topic of "China and the United Nations" has spawned a vast literature, especially in this country. Over the years scholars have had a field day with its legal and political complexities. Imaginative commentators have offered a wide variety of nostrums that promised Americans virtually painless relief from the painful reality of adjusting to the United Nations' inevitable assimilation of a revolutionary government that represents roughly one quarter of humanity. What can be added here within the modest space allotted? Perhaps the most useful contribution would be first to suggest my own reappraisal of the situation and then in light of this background to analyze the principal choices that are open to us in the General Assembly.

## I

It may clarify the issues before us this morning to assess the prospects of change in China's U.N. representation in terms of the elements of decision-making articulated by Professors McDougal and Goodman in their 1966 essay.<sup>1</sup> Which U.N. organ is the principal, or at least initial, decision-maker? How does it perceive the nature of the decision? What are the criteria for decision? What are the procedures for decision? And what are the likely consequences of the initial decision?

Ever since late 1950, of course, there has been widespread agreement that the General Assembly, the only organ in which all U.N. Members have a vote, should assume initial and primary responsibility for dealing with the Chinese representation question.<sup>2</sup> It would appear to be too late in

<sup>1</sup> McDougal and Goodman, "Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution," 60 A.J.I.L. 671, 718 *et seq.* (1966).

<sup>2</sup> This agreement was formally manifested in Res. 396 (V) of the General Assembly, Dec. 14, 1950, the text of which may be found in Sohn, *Cases on United Nations Law* 117-118 (1967). For summaries of the history of the Chinese representation question and citations to the literature, see *e.g.*, *ibid.* at 104-124; and McDougal and Goodman, *loc. cit.* note 1, at 677 *et seq.*

the day to argue, as some scholars have, that the matter should first be decided by the Security Council.<sup>3</sup> This was most recently demonstrated in February, when, despite the fact that many Council members expressed "strong reservations" about the Nationalist Government's right to represent China, no action was even attempted in the Council.<sup>4</sup>

The initial primacy of the Assembly, sustained by the unbroken practice of two decades, rests upon a characterization of the situation as one in which "more than one authority claims to be the government entitled to represent a Member State in the United Nations."<sup>5</sup> Both of the competing authorities—the Nationalist Government as well as the Communist government—have always agreed that this is a correct characterization of the nature of the decision. Scholars tilt at windmills by arguing that these are not governments struggling to represent the state of China in the United Nations but, rather, two separate entities.<sup>6</sup> If the world community believed that the People's Republic, which controls all of mainland China, had changed that territory so drastically as to transform itself into a "new" entity incapable of representing the Member state of China, the General Assembly would surely not be on the verge of replacing Taipei with Peking. Instead, efforts to bring the People's Republic of China into the United Nations would have to be approved by the Security Council prior to Assembly action, as in the case of an application for admission to membership.<sup>7</sup> Indeed, for years the United States argued that Peking's entry would be tantamount to admission of a new state, but it finally had to retreat to representation rhetoric.<sup>8</sup> Moreover, evidence from practice regarding recognition and establishment of diplomatic relations leaves no doubt that Peking and Taipei are deemed to be competing, mutually exclusive representatives of the same territorial community, the state of China.<sup>9</sup>

<sup>3</sup> See McDougal and Goodman, *loc. cit.* note 1, at 720-721. The authors seek to convey the impression that the Council "undercut the rationale of primary Assembly competence when that body [*i.e.*, the Council] rejected an amendment to its Rules of Procedure which would have required the President of the Council to ascertain the views of all U.N. Members before the Council decided a 'representation' question." *Ibid.* The authors neglect to point out that, in rejecting this proposal, the Council's Committee of Experts suggested that "the question under consideration was of such a nature that the General Assembly should be the organ of the United Nations to initiate the study and to seek uniformity and co-ordination with regard to the procedure governing representation and credentials." The quotation is reproduced in Sohn, *op. cit.* note 2, at 105.

<sup>4</sup> See U.N. Doc. S/PV.1565, Feb. 9, 1971, pp. 23-41; and Washington Post, Feb. 10, 1971.

<sup>5</sup> The quotation is from the preamble of Res. 396(V), *loc. cit.* note 2, at 117.

<sup>6</sup> See McDougal and Goodman, *loc. cit.* note 1, at 696-702.

<sup>7</sup> Art. 4(2) of the Charter provides that: "The admission of [a] state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

<sup>8</sup> See McDougal and Goodman, *loc. cit.* note 1, at 673 (note 7).

<sup>9</sup> Hsiung, "China's Recognition Practice and Its Implications in International Law," in Cohen (ed.), *China's Practice of International Law: Some Case Studies* (Cambridge, Mass., Harvard University Press, 1972).



If the past twenty years have witnessed a high degree of consensus regarding the identity of the initial decision-maker and the nature of the decision, the same can probably not be said about the criteria for decision. It is, of course, sometimes difficult to know the reasons for a particular state's vote, even if the reasons offered are accepted at face value. Some states invoke a number of criteria, while others offer no clear explanation. To a certain extent the burgeoning support for Peking undoubtedly marks a rejection of vague, value-laden criteria such as whether a claimant is "peace-loving," "willing to carry out [Charter] obligations," and "dedicated to Charter principles"; it is increasingly recognized that all criteria except whether a claimant controls the bulk of the state's territorial and other resources easily become instruments of ideological manipulation for the exclusion of a claimant that challenges the status quo. Moral absolutism has been declining at the United Nations, in large part because of intensifying revulsion over the conduct of the United States in Indochina.<sup>10</sup> Yet to a certain extent this growing support does not indicate rejection of value-laden criteria so much as enhanced appreciation of the reasonableness of the PRC's conduct. There has been mounting awareness that "the menace of Chinese Communist aggression" was exaggerated and the PRC's return to active diplomacy after the Cultural Revolution has won new friends. Whatever the causes, one senses a more relativistic outlook among United Nations Members and a renewed determination that, unlike NATO or the Warsaw Pact organization, the United Nations must not be limited to like-minded elites bent on promoting a common version of maximum public order. Many states have come to believe that, despite its revolutionary ideology, the advent of the People's Republic of China will not significantly lower the already low common denominator among United Nations Members regarding minimum standards of public order. Even those that fear an immediate strain upon the United Nations' too fragile condition recognize that, in the long run, Peking's participation will strengthen rather than weaken the world organization.

The shifting emphasis in the criteria for decision has bolstered the view that, whatever the ultimate fate of Taiwan, the Communists rather than the Nationalists deserve to represent China in the United Nations. And this in turn has affected the attitude of Member States toward the procedures for decision, diminishing their enthusiasm for placing obstacles in Peking's path. Thus it is unlikely that the General Assembly will long continue to regard China's representation as an "important question" requiring approval by a two-thirds majority prior to any change.

<sup>10</sup> See, for example, the recent remarks of the representative of Somalia: "It is ironic that one of the main supporters of the argument that China is not a peace-loving nation, the United States, has been involved in a war of aggression against the people of Vietnam where hundreds of thousands of people have been killed or maimed, and where atrocities comparable to those condemned at Nuremberg have been committed by its forces."

"... A number of those governments which arrogate for themselves the duty of passing moral judgments on the action of the Chinese Government in its international relations are themselves engaged in reprehensible conduct unbecoming to their membership of the United Nations." U.N. Doc. S/PV.1565, pp. 29-30.

This new attitude has an important bearing upon the vital question of how the Security Council will react to an Assembly decision in favor of Peking. The Council is plainly not bound by the Assembly action. Moreover, any effort to change China's representation in the Council will confront several difficult issues: whether the question should be decided by the Council itself or by a ruling of the President of the Council; whether Taipei's delegation, a party in interest, is entitled to vote on its own ouster; and whether its negative vote or that of any of the other permanent Council members constitutes a veto. Nevertheless, it would be a serious mistake to assume that, if the Assembly decides to substitute Peking for Taipei, this "would be almost to guarantee that different 'Chinese' delegations will sit in different organs of the United Nations."<sup>11</sup> Few diplomats make that assumption. Indeed, many believe that, if ousted from the Assembly, Taipei would simply withdraw from other U.N. organs rather than suffer the humiliation of further adverse representation decisions.

Even if Taipei should choose to fight on, however, one can reasonably expect the Council to follow the Assembly's lead and avoid the ludicrous spectacle of Taipei remaining in the Council when Peking is in the Assembly. Rather than submit the matter directly to the Council, perhaps a friendly President of the Council will avoid the other voting problems by ruling that the question is one of "credentials" and that the credentials of Peking's delegation are in order while those of Taipei's delegation are not; Taipei could not muster sufficient votes to sustain a challenge to the President's ruling. If the question is submitted to the Council itself for decision, perhaps the Council will hold Taipei ineligible to vote, despite the fact that Article 27(3) of the Charter only precludes a party to a dispute from voting on decisions under Chapter VI and Article 52(3).<sup>12</sup> Perhaps, if Taipei is permitted to vote, or if in any event the United States casts a negative vote and claims that it constitutes a veto, the Council will build upon precedents that restrict the applicability of the veto and hold that the decision involves a "procedural matter."<sup>13</sup> One way or the other, the Council is unlikely to engage in self-stultification.

<sup>11</sup> The quotation is from McDougal and Goodman, *loc. cit.* note 1, at 721.

<sup>12</sup> The pertinent paragraphs of Art. 27 of the Charter state:

"2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

"3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

For discussion of abstention from voting by parties to a dispute and citations to the literature, see Sohn, *op. cit.* note 2, at 135-148.

<sup>13</sup> It should be noted that the United States has not held a consistent position on the applicability of the veto to the representation question. In 1950, confident of its voting strength, it maintained that this was a procedural matter. In 1951 Secretary Acheson stated that, if the United States should find itself in a minority in voting on China's representation, the International Court of Justice should be asked to determine the significance of a negative vote. In 1954 the United States announced that a negative vote on this question by a permanent member of the Council constituted a veto. Sohn, *op. cit.* note 2, at 106-107. For a discussion of the so-called "double veto" problem and citations to the literature, see *ibid.* at 148-231.

## II

In these circumstances what position should the United States take in the General Assembly this fall? Taipei is strongly urging us to stick to our guns and continue to oppose the Albanian resolution that would substitute the Communists for the Nationalists. It still believes that all-out American arm-twisting can carry the day. This alternative is attractive to those in our Government whose overriding concern is to avoid offense to Chiang Kai-shek, whether because of sentimental attachment, military strategy, anti-Communism, or other reasons. It is also attractive to those who believe that Peking belongs in the United Nations as soon as possible and that the swiftest way to accomplish this without risking offense to either the Chiang regime or right-wing opinion at home is to do precisely what Chiang asks and complacently go down with the ship.

But diplomatic defeat is never easy to swallow, especially given the American preoccupation with "face," and some officials fear that, by persisting in past policy in the face of probable defeat, the United States will appear more ostrich-like than ever, both at home and abroad. Moreover, if the American people see "Red China" enter the United Nations over our opposition, this may damage the standing of the United Nations in this country and intensify popular hostility toward Peking. It will also do nothing, of course, to convince Chairman Mao that there has been a significant change in U. S. policy.

For these reasons the Nixon Administration is plainly under great pressure to come up with something. But what? Given the importance of having 750 million Chinese represented in the United Nations, given the fact that neither of the contending Chinese regimes will tolerate the representation of the other, and given the rising tide of sentiment in favor of Peking, one obvious alternative would be completely to abandon our moribund policy and to adjust to the new situation as gracefully as possible by welcoming Peking into the United Nations.

In the "real world" of foreign policy bureaucracies, however, movement away from even a moribund policy tends to be glacial. Diplomats prefer to operate incrementally rather than dramatically. "Sudden" abandonment of Generalissimo Chiang, if only at the United Nations and with our backs to the wall, would cause too many repercussions in Taiwan, among allies such as Japan, Thailand and South Korea, and at home—or so it is thought.

So the lights are burning late at the State Department and officials are willing to listen to any ideas, as the search for a new policy continues. Some impressive voices, both in and out of government, are now backing a "dual representation" tactic. Although the White House denied any change in policy last fall, after our U.N. delegation virtually suggested having both Chinas in the United Nations, the Government has already staked out the terrain for such a shift in our position. The Javits resolution, recently introduced in the Senate by a bipartisan group, indicates an attempt to muster public support for this shift.

The proponents of "dual representation" argue: If support for Taipei against Peking is no longer feasible and if support for Peking against Taipei

is unpalatable, what could be more reasonable, more American and more traditionally Chinese, than a compromise? Why not permit both rival governments to represent China in the United Nations? According to this alternative, we would welcome Peking's entry, even giving it China's permanent seat on the Security Council, so long as Taipei was allowed one of two Chinese seats in the General Assembly. This would accommodate the general desire to make the United Nations as inclusive as possible and the specific reluctance of some states to witness the departure of the Nationalist delegation that has represented China since the United Nation's founding. For these reasons dual representation might prove sufficiently attractive to win a majority of votes within the Assembly and prevent adoption of the Albanian resolution. Furthermore, its supporters point out, even if it failed to prevail, this maneuver would at least permit the United States to appear, both at home and abroad, to be responding flexibly and reasonably to the new situation.

The advocates of dual representation concede that the major drawback to their proposal is substantial: both Peking and Taipei are adamant in their refusal to accept it. Neither of the rivals is willing to compromise its claim to be the sole legitimate government of China. Yet, the argument runs, even if both do initially reject an Assembly resolution based on this formula, eventually they might be willing to change their minds. Until then, of course, although there is a slight chance that Peking might agree to replace Taipei in the Security Council without waiting for the representation question to be resolved to its satisfaction in the Assembly, it is unlikely that there would be any PRC representation in the United Nations. And this situation might last for a long time.

From the viewpoint of the world community, further postponement of the PRC's participation in the United Nations would be most unfortunate. From the viewpoint of U. S. national interest, the vice of the dual representation tactic is that it will cause a serious deterioration in our relations with Taipei while at the same time certainly not improving and perhaps even exacerbating our relations with Peking. In Peking and many other capitals it will be seen as the gimmick for the '70s, a worthy successor to previous U. S. tactics: the "moratorium" that kept Chinese representation off the U.N. agenda in the '50s, and the "important question" device of the '60s. Beneath a façade of reasonable compromise, it asks Peking to pay an unacceptable cost for entry into the United Nations. Neither legally nor politically—especially since the political tide is clearly in Peking's favor—is there any reason for Peking to accept what many Americans may call a "significant compromise" but what Peking would understandably see as a desperate last effort to salvage Taipei's bankrupt regime and our past policy.

If a dual representation proposal is adopted in lieu of the Albanian resolution, Taipei, because of its deteriorating position, may ultimately have to relent and remain in the United Nations despite the humiliating terms. But Peking is very likely to remain outside the United Nations—to everyone's loss except Taipei's.

This leaves the shoe on the wrong foot, for it keeps Peking out of the

United Nations during the possibly long period before there is a solution of the Taiwan problem. It allows our concern for continuing representation of Taiwan's 14 million people to justify continuing exclusion of mainland China's 750 million.

Surely, if we have to choose for the foreseeable future between representation for 750 million and representation for 14 million—and this is the unpleasant choice that confronts us, political considerations as well as Benthamite principles should guide that choice. The fact is that it is in the interest of both the United States and the world community for Peking to enter the United Nations as soon as possible. Until it does, the United Nations will be precluded from coping with the Indochina conflict, the arms race and a host of other vital issues; we will be losing more precious time in which to moderate Peking's conduct through participation in U.N. affairs, and the United States will be depriving itself of an excellent channel for private, informal, sustained contacts with Peking.

A dual representation tactic would be unfortunate not only if it is adopted by the United Nations, but also if it fails to be adopted. If it fails and the Albanian resolution succeeds, Peking will come in on terms that we will have continued to oppose. We will have offended Peking as well as Taipei, and the United States will have suffered "a defeat," thereby risking an adverse public and Congressional reaction against both the United Nations and the People's Republic (*cf.* the recent flap over the mere appointment of a Russian as an Assistant Secretary General of the International Labor Organization). If the dual representation tactic fails to be adopted but nevertheless diverts votes from the Albanian resolution and thereby helps to prevent its adoption, we will have again succeeded in counterproductively barring Peking.

For these reasons the United States should reject dual representation. Instead, in the best of all possible worlds, it should genuinely welcome Peking into the United Nations by supporting a proposal similar to the Albanian resolution, but less objectionably phrased. If that choice should be deemed "unrealistic," rather than resort to dual representation it would even be preferable for the United States to maintain its present support for Taipei, but without twisting arms, for this, too, would assure Peking's entry, albeit in unattractive circumstances. There is, however, a fourth option that is both "realistic" and attractive: that is, for the United States to guarantee Peking's entry into the United Nations by abstaining from the vote on the Albanian resolution. Abstention would obviously cause more serious deterioration in our relations with Taipei than would sponsorship of dual representation. Yet, unlike dual representation, which entails great cost and yields little benefit, abstention, by assuring Peking's presence in the United Nations, would produce clear long-range benefit to both the world community and ourselves. Moreover, serious deterioration in our relations with Taipei will be inevitable as we gradually move toward the establishment of diplomatic relations with Peking. But we can safely leave that complex problem to next year's meeting of the Society. This year there is challenge enough in urging an enlightened choice at the United Nations.

## CHINESE PARTICIPATION IN THE UNITED NATIONS: THE IMPERATIVES OF A NEGOTIATED SETTLEMENT

*By Richard M. Goodman \**

For two decades scholars and diplomats have debated the question of Chinese participation in the United Nations. Yet, with but few exceptions, no one has yet devised, or even suggested, rational criteria and procedures for solving the problem. Analyses have been myopic; and proposed solutions have seldom been comprehensive in focus. Nowhere is this more apparent than in the yearly U.N. debates about Chinese "representation." The principal draft resolutions so polarize discussion that there is little opportunity for reasoned analysis.

In this talk I will propose rational procedures for solving the Chinese participation question. I will also suggest criteria that should guide decision. Before attempting either of these tasks, let me emphasize their importance by briefly reviewing the major costs of present procedures.

### *A. The Costs of Present Procedures*

First, whatever the vote on the Albanian resolution, decision will dramatically undercut universality within the United Nations. The Albanian resolution forces a choice between the two Chinas. If it fails to pass, one of the world's major governments will remain outside the United Nations. If it should pass, a government controlling a population greater than that of the vast majority of U.N. Members will no longer participate in the United Nations. And it may be forced to remain outside the United Nations for a substantial period of time. If the Albanian strategy is successful, Communist China will sit as a permanent member of the Security Council; and it will surely veto membership applications by the Republic of China or Taiwan.

This suggests a second cost of present procedures: a loss of flexibility in decision-making. Under present procedures political compromise is impossible; membership rights cannot be adjusted to political realities. Indeed, present procedures subvert almost every recommendation made by China specialists for solving the Chinese participation question.<sup>1</sup>

Present procedures have a third major cost. They focus on only a limited segment of a far more complex problem. The yearly Assembly debates seem to forget that any decision on Chinese participation will involve, directly or indirectly, the seat of a permanent member of the Security Council. "China's" seats on the Specialized Agencies are all but ignored. The debates last fall, indeed, made no attempt to predict what will hap-

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<sup>1</sup> See, e.g., Barnett, *Our China Policy* 38-44 (Headline Series No. 204) (1971); L. Chen and H. Lasswell, *Formosa, China and the United Nations* v (1967); letter to the New York Times from Professors Reischauer, Fairbank and other East Asian specialists at Harvard University (including Professor Cohen), Oct. 28, 1970, p. 46, col. 4.

pen if Communist China sits as a permanent member of the Security Council.<sup>2</sup>

Fourth, present procedures do not allow a co-ordinated decision on Chinese participation within the United Nations system. An Assembly vote to seat the Communist Chinese will not dictate decision in the Security Council or elsewhere. A decision to seat the Communist Chinese on the Security Council may well be a "substantive" matter, which, under Article 27, is subject to the veto. To bar the Communist Chinese from participation, all that is necessary is a Presidential decision that the question is "substantive," seven votes (including abstentions) to block an attempt to overrule the President's decision, and a veto by the United States. Even if the question is thought "procedural," seven votes against the Communist Chinese will bar them from the Council.

Consider the consequences. First, if the Security Council vote goes against the Communist Chinese, both "Chinas" will have rights to sit on different bodies within the United Nations. The confusion bound to ensue hardly needs explication. Second, if the Security Council vote goes against the Communist Chinese, it is highly unlikely that Communist China will participate in any body within the United Nations system. Third, present procedures may place a premium on procedural manipulation in the General Assembly. Each side in the Chinese participation debate will probably use parliamentary techniques to ensure that the Assembly debate ends, and the question comes before the Council, in a month when each side is certain that the President will rule its way on the "substance"—"procedure" question. These costs and more jeopardize rational decision-making within the United Nations.

There is an alternative to present procedures. It requires the Chinese participation question to be settled by negotiation. And it demands that these negotiations adjust participation rights so that the distribution of power within the Organization permits the United Nations to function effectively, and fairly reflects the power structure of the contemporary world. To trace the juridical basis for this alternative, let us review briefly the legal aspects of the Chinese participation question.

### B. *Legal Aspects of the Chinese Participation Question*

Three schools of thought dominate legal analysis of the Chinese participation question: the "credentials," "representation," and "membership" schools.<sup>3</sup>

The credentials school argues that the Chinese participation question is in reality a "credentials" question, with decision to be governed by the rules of procedure of each organ. But the Chinese participation question is clearly not a "credentials" question. It does not merely demand examination of the authenticity and validity of a delegate's credentials, as have

<sup>2</sup> 25 U.N. GAOR, 1902nd meeting ff. (1970).

<sup>3</sup> For a more complete analysis, see McDougal and Goodman, "Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution," 60 A.J.L.L. 671 (1966).

past credentials decisions. Its real effect is to force decision about the status of the authority that issued the credentials. Choice is not between two competing delegates, one of whom has proper credentials, the other, a forged document. Choice is between two competing governments, each with substantial bases of power. No past "credentials" decision has required a comparable choice.

A "representation" school urges that the dominant issue is deciding which of the two claimants really "represents" China. Its authority is General Assembly Resolution 396(V).<sup>4</sup> Labeling the Chinese participation question a matter of "representation" does little to clarify analysis. Neither the Charter, nor Resolution 396(V), nor past practice, attaches significant legal consequences to the "representation" label. The supposedly authoritative resolution makes no attempt to stipulate the vote that will govern the "representation" decision. It does not authoritatively allocate decision-making competence within the United Nations system. It only recommends that the General Assembly first decide the question, and that the other organs take the Assembly decision "into account." More importantly, it does not stipulate how the Chinese participation question is to be decided. It states no meaningful criteria for decision. It does not indicate whether the Assembly is to choose between competing claimants or whether it should avoid choice and seat both claimants under a "successor states" formula. The resolution, indeed, comes very close to leaving the Assembly in precisely the same position it was in before its passage.

A final school of thought would call the Chinese participation question a matter of "membership." This school invokes Article 4 of the Charter, which states both procedures and criteria for admitting a state to membership in the United Nations. For admission a state must be "peace-loving" and "willing to fulfill its international obligations." Communist China, it is thought, must pass both these substantive tests. The membership school also looks to Articles 5 and 6 of the Charter, which specify both criteria and procedures for suspending and expelling a Member of the United Nations. Neither article, it is claimed, would permit the exclusion of Nationalist China from the United Nations.

Some would challenge the membership school by claiming that membership is irrelevant when deciding the Chinese participation question. China, it is claimed, is already a Member of the United Nations. Articles 5 and 6 are also thought inapposite. All the Albanian resolution does is substitute a delegation from Communist China for a delegation from Nationalist China. The underlying rights of China—a Member of the United Nations—remain undisturbed.

To even the uninitiated this argument must be wholly formalistic. Seating the Communist Chinese delegation and expelling the Nationalist Chinese delegation will have all the important operational effects of admitting a new Member to the United Nations, and expelling a present

<sup>4</sup> The resolution and related materials are conveniently collected in L. Sohn, *Cases on United Nations Law* at 104 ff. (2d ed., 1967).



Member. If Communist China is seated, seven hundred million people, hitherto unrepresented, will have some voice in United Nations decision-making. One of the world's major governments, which has never fully participated in international organization, will now send its delegates to the United Nations. And the delegates from Communist China will bring to the United Nations an entirely new set of foreign policy goals and strategies.

Similarly, expelling the Nationalist delegation will have all the important operational effects of expelling a Member State. The Republic of China, with a population greater than that of two thirds of the United Nations Members, will no longer be represented in the United Nations. And its exclusion may well be for a substantial period of time.

But even the membership school does not state a strong enough case. The Chinese participation question has far greater impacts than any past membership case. Decision about Chinese participation will dispose of a Security Council seat. Past membership decisions have awarded only a seat in the General Assembly. The Security Council seat will be that of a permanent member, with its trappings of legitimacy and authority. No past membership decision has dealt with such important stakes. The conclusion is inescapable: If our analysis is to be restricted to the three schools, the membership school clearly has the best case.

In my view all three schools miss the mark. They fail to focus on the process of decision within the United Nations. For the last twenty-five years, rights to participate have depended on whether seating a nation, not then participating in the United Nations, would significantly change the distribution of power within the Organization. If seating a claimant would have major impacts on the Organization's power structure, the claimant was barred from entry, unless entry was pursuant to a negotiated settlement. If permitting a claimant to participate had no such impacts, it was allowed to sit.

In the 1950's and early 60's alignment with one or another of the major power blocs was the key to participation. As a general proposition, nations, not then participating in the United Nations, were seated as Members if they were "non-aligned" in the bi-polar world.<sup>5</sup>

Quite different results followed if a nation, not then a participant in the United Nations, was aligned with one of the two power blocs. In the absence of a negotiated settlement, these nations were invariably barred from participation. One need only recall the great number of unsuccessful membership applications in the early years of the United Nations. Aligned nations were seated in the United Nations only pursuant to a negotiated settlement. Package deals dominated the participation process in 1955 and 1961. The package deal was the only device for seating aligned nations, which were not then participants in the United Nations. It was a flexible method of insuring that membership in the United Nations reflected the power structure of the contemporary world. It was a useful

<sup>5</sup> See McDougal and Goodman, note 3 above, at 688-692.

procedure created to prevent both power blocs from impeding universality within the United Nations system.

This past practice, in my view, should guide decision on the Chinese participation question. It certainly governs the procedure for decision; and the procedure required by past practice is the negotiated settlement. Seating Communist China in the United Nations will significantly change the distribution of power within the United Nations because it will grant a Security Council seat and great-Power status to a major nation. Past practice would exclude Communist China until a settlement were negotiated to permit its entry.

The procedural mechanics of the negotiations should be easy to arrange. The Assembly might reconsider draft resolution A/L.533, which would have established a committee of Member States that would recommend an equitable and practical solution to the problem.

Past practice also suggests principles to guide the negotiations. The goal of the negotiations should be to adjust participation rights to reflect the power structure in the contemporary world, but only so long as the effective functioning of the United Nations is not imperiled. The principle of universality should guide decision about participation in the General Assembly. The principle of responsibility should govern decision about participation rights in the Security Council.

With these principles for background, let me recommend preferred outcomes for the negotiations.

Clearly Nationalist China or Taiwan should sit in the General Assembly. Since it is not a great Power, it may be denied the seat of a permanent member in the Security Council.

Communist China certainly should sit in the Assembly. There will be minor costs to its participation in that body—the possible shift in influence to the lesser developed countries; potential disruption in the secretariat; the possible paralysis of ECAFE; and a concerted campaign against peacekeeping by the Assembly.<sup>6</sup> All these costs and others might be tolerable.

Permanent membership on the Security Council is quite a different matter. The costs of seating Communist China in the Assembly pale beside the one major cost of allowing it to participate on the Council: the drastic weakening of the United Nations' rôle in the maintenance of international peace and security. As a permanent member, Communist China will have a veto over substantive issues in the Security Council. Both past experience and the Communist Chinese model of the world of the 70's suggest that the Communist Chinese, in the foreseeable future, will veto almost all Security Council actions under Chapters VI and VII of the Charter.

In the past two decades Communist China has criticized virtually all attempts by the United Nations to maintain minimum order. During

<sup>6</sup> Bloomfield, "China, the United States, and the United Nations," 20 *Int. Organization* 653, 663-664 (1966).

the Korean conflict, and with mounting intensity since 1956, Communist China has maligned major United Nations attempts to maintain minimum order.<sup>7</sup> Invariably Communist China has been sharply critical of all United Nations "police force" activities, whatever their composition. It has suspected the UNEF, denounced the ONUC, and attacked the Yugoslavs for contributing troops to the Congo operation. It has chastized the Russians for their participation in the U.N. Special Committee on Peace-Keeping Operations. It has denounced U.N. efforts at maintaining peace and security in Cyprus, Kashmir in 1965, and in the Middle East from 1967 to date. Even the recent cease-fire resolutions on the Middle East have been held up to scorn.

If this be thought mere cavil from an outsider, consider two major objectives of Communist Chinese foreign policy in the 1970's. The first is ideological: the Communist Chinese goal is to project their revolutionary experience onto the world, and into particular countries.<sup>8</sup> Communist China's second goal will be to preserve its security. To this end it will probably practice geopolitics, employing at least two strategies. First, it will seek to divert Soviet and American attention away from Asia; second, it will do its best to maximize tension between the United States and the Soviet Union. These are precisely the strategies one would expect of a Power in a tri-polar system, a system where controlled conflict between the Powers is the accepted norm.<sup>9</sup>

Both these goals telescope in the Middle East and Africa. There armed conflict is extraordinarily frequent; and if Communist China can keep the cauldron boiling, it will divert Soviet and American attention from mainland China, and keep tensions high between the super-Powers. The two goals explain in great part Communist Chinese militant support of the Palestinian guerrillas, even as against Jordan and Lebanon.

<sup>7</sup> See McDougal and Goodman, note 3 above at 714-717. See also "The Chinese People Firmly Support the Arab People's Struggle Against Aggression" (Foreign Languages Press, ed.); New China News Agency ("NCNA") release, July 30, 1970; "U. S. Imperialism—Backer and Arch Criminal Behind Armed Aggression Against Guinea," Peking Review (No. 49) 11, Dec. 4, 1970; "Down With Revived Japanese Militarism," Peking Review (No. 36) 4, 6, Sept. 4, 1970 (opposing any contribution of troops by Japan to United Nations forces); "U.N. Tentacles Extended to Cambodia," Peking Review (No. 16) 25, April 17, 1970.

<sup>8</sup> Major recent statements of Communist Chinese ideology include Mao Tse-tung, "People of the World, Unite and Defeat the U. S. Aggressors and their Running Dogs," Peking Review (special issue), May 23, 1970; editorial departments of the People's Daily, Red Flag, and Liberation Army Daily, "Long Live the Victory of the Dictatorship of the Proletariat," NCNA release, March 17, 1971. The principles of Communist Chinese foreign policy were stated thus by Lin Piao in his Report to the Ninth National Congress of the Communist Chinese Party: "to develop relations of friendship, mutual assistance and cooperation with socialist countries on the principle of proletarian internationalism; to support and assist the revolutionary struggles of all the oppressed people and nations; to strive for peaceful coexistence with countries having different social systems . . . ; and to oppose the imperialist policies of aggression and war." Lin Piao, "On China's Relations with Foreign Countries," translated in 2 Chinese Law & Gov't. 51, 58-59 (1969).

<sup>9</sup> See Lowenthal, "Russia and China: Controlled Conflict," 49 Foreign Affairs 507 (1971).

Yet it is precisely in the Middle East and Africa that U.N. peacekeeping has been most needed and most effective. Both super-Powers have been able to turn to the United Nations, and particularly the Secretary General, to cool off explosive situations there. The Soviet Union and the United States have begun to recognize a common interest in maintaining minimum order; and the Security Council has increasingly assumed "primary responsibility for the maintenance of international peace and security." The Secretariat has assisted the Council by providing neutral intermediaries to aid in dispute-settlement and neutral forces to quiet conflict.<sup>10</sup>

All this will change if Communist China has a permanent seat on the Security Council. For it is in the Middle East and Africa that the peacekeeping rôle of the United Nations and the geopolitical and ideological goals of Communist China are in sharpest conflict. If Communist China sits as a permanent member, the Communist Chinese veto will stultify Council action, and U.N. peacekeeping activities will shift from the Security Council to the General Assembly. This strikes me as a major cost of full Communist Chinese participation on the Security Council.

The General Assembly of the 1970's, further, will be a strikingly different body than the General Assembly of the 1950's. It will be double the size; and the great number of Members anxious to use it as a forum may prevent it from functioning quickly and effectively in a peacekeeping rôle.

The result, I believe, will be great-Power co-operation *outside the United Nations* to restore and maintain minimum order. The United Nations, almost by default, will lose the modest peacekeeping rôle that it now has. We have already had intimations of great-Power co-operation outside the United Nations when Secretary Rogers proposed that a United States and Soviet force patrol in the Middle East. Should this trend continue—and permitting Communist China to have a veto on the Council will surely hasten it—we deprive the United Nations of one of its most important functions. This, for me, is an unacceptable cost of full participation by Communist China on the Security Council.

To say that Communist China should not participate fully on the Security Council is not to say that Communist China should be barred from that organ. A great variety of participation rights are possible. Communist China might sit as a permanent member without the veto, or with a veto on limited issues. In this connection, I recommend that the ultimate fallback position for the United Nations be a veto which applies only to Asian affairs. To these recommendations there is one standard objection: they will not be accepted by either Nationalist or Communist China.

With Dr. Tan here, I shall not presume to speak for Nationalist China. Let me comment, however, on Communist Chinese attitudes.

The Communist Chinese attitudes toward the United Nations are changing. They have begun to see the United Nations as a "forum."<sup>11</sup> They

<sup>10</sup> See the perceptive account by O. Young, *The Intermediaries* (1967).

<sup>11</sup> "U.N. Anniversary Session Becomes Platform for Denouncing U. S. Imperialism," *Peking Review* (No. 45) 21-22, Nov. 6, 1970.

have come to realize that the United States can be defeated in Assembly votes.<sup>12</sup> This change in attitude is reflected in the conditions that the Communist Chinese have demanded of the United Nations, conditions that must be met prior to Communist Chinese participation. The Communist Chinese presented the world a list of these conditions in 1965; perhaps they actually hoped to create a "revolutionary United Nations." But the coup in Indonesia and the postponement of the Second Bandung Conference may well have forced the Communist Chinese to re-examine their world-wide revolutionary strategies. There is no doubt that they underestimated the ties between the African and Asian nations and the United Nations. Perhaps in consequence, Communist China dropped its specific listing of conditions for participation in 1966 and 1967. In those years it only asked "rectification" of the United Nations. From 1968 through 1970 even the demand for rectification was dropped.<sup>13</sup>

For Communist China the United Nations may be a valuable arena in which to influence world politics. To the extent that this is so, the United Nations has marked freedom in deciding how best to adjust Chinese participation rights in the Assembly and in the Security Council.

### COMMENTS BY DR. LUNG-CHU CHEN \*

The so-called dilemma of "two Chinas" or "dual representation" in the United Nations is due to the fact that Taiwan, or Formosa, if you like, has too often been misidentified as "China." In a basic sense, China is not at issue, because it is quite clear who governs the 800 million people on the Chinese mainland. The real issue is Taiwan, whose international legal status is yet to be settled.

The 1951 Japanese Peace Treaty affirmed the colonial status of Taiwan and kept its legal status undetermined pending an international settlement. Japan renounced all her "rights, title and claim" to Taiwan, but the treaty did not specify any beneficiary. The sovereignty of Taiwan has not been transferred to China, Nationalist or Communist. Contrary to the claims of Chiang and Mao and their supporters, Taiwan does not belong to China. Taiwan is Taiwan and China is China; they are two separate political entities.

For centuries the Formosan people have been living in an environment different from that of the Chinese people and undergoing experiences dis-

<sup>12</sup> "... U. S. imperialism has little support for its unjust cause and is extremely isolated and in disgrace even in the United Nations," in "U. S. Imperialism—Backer and Arch Criminal Behind Armed Aggression Against Guinea," Peking Review (No. 49) 11, Dec. 4, 1970.

<sup>13</sup> Compare Chen Yi, Press Conference of Sept. 20, 1965, in Peking Review (No. 41) 7, 12 (Oct. 8, 1965), with "UNGA Again Debates Chinese Representation," NCNA release, Nov. 21, 1968; and "U.N. General Assembly Debate on Restoration of China's Legitimate Rights in the U.N.: U. S. Imperialism's Policy of Hostility Towards China Suffers Serious Defeat," Peking Review (No. 48) 20, Nov. 27, 1970.

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tinctly Formosan. They have forged a distinct sense of identity and perspective in their quest to be masters of their own destiny. The Taiwanese people do not identify with the People's Republic of China, a foreign country with which they have never had contact. It is significant to note that, ever since its founding twenty-two years ago, the People's Republic of China has never extended its jurisdiction and effective control over Taiwan.

Nor do the Taiwanese people identify with the Chiang Kai-shek regime. Betraying the trust of the Allied Powers, the exiled Chiang regime has usurped the sovereign power of the people of Taiwan and illegally occupied the island. At present, the 12 million Taiwanese, 85 percent of the island's population, are allowed only a 3 percent token representation in the congressional bodies on Taiwan. Under the reign of terror and coercion of the Chiang regime, as perpetuated by the secret police and the continuous imposition of martial law for more than twenty years, Formosa has become a non-self-governing territory. The Formosans have been deprived of the right of self-expression, self-government and self-determination.

If there should be a settlement by negotiation, as suggested, the true representatives of the people of Taiwan, not the Chiang regime, must be included.

The crux of the question of Chinese participation in the United Nations is whether or not Taiwan is or should be part of China. A peaceful and clear-cut solution that would best serve the common interests of all parties concerned and promote world public order would be to apply the principle of self-determination by holding a plebiscite on Taiwan under United Nations auspices. Let the future of Taiwan be decided by the 14 million people in Taiwan, not by the 800 million people in China. And let all parties concerned abide by the outcome of such a plebiscite. Legally, such a solution would be imperative because the international legal status of Taiwan remains undetermined subsequent to the termination of half a century of Japanese colonial rule. As in the case of some 60 former colonial territories that have achieved independence after World War II, the principle of self-determination should be applied to Taiwan.

Politically, such a plebiscite would be practical and sound because it would subject the assertions and assumptions of all claimants, including those of Communist Chinese, Nationalist Chinese and Taiwanese, to verification in an impartial and peaceful procedure. Imposing any solution about the future of Taiwan against the wishes of its inhabitants is not a solution at all, it would be a constant source of instability and disorder. I hardly need to remind you that 14 million people are a population larger than that of more than two thirds of the Member States of the United Nations. Taiwan has more people than most of the European countries.

Morally, such a solution would be just, because it gives true expression to human dignity and human rights. If human dignity and human rights mean anything at all, they mean that the 14 million people on Taiwan must not again become a pawn of power politics. The age for trading

people like sand and rock, like a piece of property, is long past. The future of Taiwan as well as American policy in this matter must not be dictated by what Chiang and Mao say, what they like or dislike. It is suggested that somebody has to pay the "price"; but why the long oppressed Taiwanese people? Any solution that would accommodate the People's Republic of China at the expense of the 14 million people on Taiwan will not serve the common interests of the world community, nor will it serve the "national interest" of the United States.

There is not the slightest doubt in my mind what the outcome would be if a U.N. plebiscite were held on Taiwan today. Given a free and honest election, the overwhelming majority of the people of Taiwan would choose to establish an independent state of Taiwan, free of foreign domination, Chinese or otherwise. This independent state of Taiwan should be admitted as a Member of the United Nations. Thus both China and Taiwan would be seated in the United Nations, not as two Chinas, but as China and Taiwan. There would be no China dilemma.

On the other hand, should such a plebiscite result in integration of Taiwan with China, there would be no China problem either.

Accordingly, it appears that a U.N. plebiscite for Taiwan in accord with the principle of self-determination is a prerequisite and the key to a just and viable solution to the question of Chinese participation in the United Nations.

### COMMENTS BY WILLIAM P. BUNDY \*

Professor WILLIAM BUNDY began his remarks by commenting that it was imperative to find a way for the Peoples' Republic of China to enter the United Nations. Although Professor Cohen said that the emergence of the China question had come as a rude shock to the United States, Professor BUNDY doubted that it could be characterized as such. In fact, if China had not gone into the Cultural Revolution in 1966, the United States might have changed its position as to the entrance of China into the United Nations at that time.

The Peoples' Republic of China has a great need for communication with and exposure to the world forum. The benefits derived from the membership of China in the United Nations would be much greater than the negative elements; yet, there should also be recognized the need to protect the Republic of China on Taiwan—or, in consideration of Professor Chen's remarks, whatever separate government emerges on Taiwan.

While recognizing that the United States does not control the ultimate resolution of this issue, Professor BUNDY said that the United States should not take a passive rôle in the decision. Rather, it should take the initiative. He therefore considered the simple device of abstaining on a vote for China's admission through the Albanian Resolution to be unappealing.

Contrary to Professor Goodman's opinion, he stated that if the People's

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Republic of China became a member of the General Assembly, as a practical matter its unqualified membership in the Security Council was then inevitable. If the President of the Security Council presented the issue as procedural, the question of a U.S. veto would go back to the Acheson-Austin theory that there was no U.S. veto in such a situation. As for the possibility of negotiating an area restriction in the use of the veto, as Professor Goodman had suggested, Mr. BUNDY noted that this would require Charter amendment of a nature that simply could not be envisaged. On the other hand, there might be some medium-term possibility of a Charter amendment to expand the Security Council by creating two permanent Asian seats, which might then rotate among the major Asian Powers.

More broadly, Mr. BUNDY did not believe that Professor Goodman's parallel of past negotiated settlements concerning the membership of groups of nations was really in point. The area for negotiation in the present situation was quite limited, and the possibility of finding middle ground had been weakened by the premature Italian Resolution of 1966 for a study group, which had now been roundly defeated in several Assemblies.

Responding briefly to Professor Chen's remarks, Mr. BUNDY expressed the hope that there would be a more representative basis of government in Taiwan, but did not believe this could be achieved at the present time through international or U.N. action.

Turning to the fundamental question whether the admission of both the People's Republic of China and the Republic of China was conceivable, Mr. BUNDY questioned Professor Cohen's argument that the "one China" view held by both parties should be decisive. In ordinary law situations, the characterization by parties of their own rôles was not regarded as controlling. Today, even though the Germans, Vietnamese, and Koreans all argue that their countries form a single entity, this self-characterization does not determine the action of other nations in the international sphere. In the case of China, there was the simple fact that two governments—or three, counting Outer Mongolia—were effective entities exercising government control within the Chinese territory.

Hence, Mr. BUNDY did not believe that it was out of the question that the People's Republic of China would refuse to enter the United Nations unless accepted as the sole government of China. Since September, 1970, at least, the world community had been dealing with an astute and essentially pragmatic leadership in Peking.

Fundamentally, Mr. BUNDY argued that Taiwan could not be ignored, that it was anything but a bankrupt regime as Professor Cohen had suggested, and that its 14 million people had important rights and feelings.

As to a possible formula for accepting into the United Nations "two governments operating in a single territory," Mr. BUNDY thought that the most relevant precedent might be that of Egypt and Syria following the break-up of the United Arab Republic. However, there might be other formulae that would meet the need.



## REPRESENTATION OF CHINA IN THE UNITED NATIONS

*By S. H. Tan \**

In view of the emphasis on "criteria for decision" or "criteria to guide decision" and the "major costs" of certain suggested procedures, I would like to make a few remarks along historical and legal lines reflecting the position of the Government of the Republic of China on the question of China's representation in the United Nations, which, in my judgment, will be pertinent not only to what has been said on this Panel this morning but also to much of what has been published in academic journals and periodicals and many of the official statements made by delegates to the United Nations relative thereto.

(1) First, a question could be raised as to why the Republic of China has been given such an important place in the United Nations, for instance, her permanent seat on the Security Council. In order to understand this, we shall have to recall the history of the United Nations from its very inception—the consultations among the principal Allies during the war, the Dumbarton Oaks meetings in 1944, and the organization conference of the United Nations in 1945. The important position assigned to China was not because of her enormous population or her vast territory but rather because of the magnitude of her sacrifices during the war. From 1931 to 1937 China resisted the Japanese aggression against her Northeastern Provinces, and the League of Nations was unable to render effective assistance pursuant to the Covenant. From July, 1937, to the attack on Pearl Harbor in December, 1941, China fought singlehandedly against the Japanese war machine, one of the mightiest at the time. As a result, China suffered widely extended destruction and tremendous losses. According to government statistics, she suffered three million and a quarter military casualties and three to four times as many civilian casualties. The material destruction and damage were estimated at more than fifty-eight billion U.S. dollars.

(2) It was by virtue of these losses that the Republic of China was given a permanent seat on the Security Council. In this connection it should be pointed out that the official name of China as the "Republic of China" has found expression not only in Article 23 of the Charter, dealing with the composition of the Security Council, but also in Article 110, par. 3, regarding the ratification and coming into force of that instrument.

(3) When we discuss the question of China's participation, we have to bear in mind that we are dealing with the representation of the government which led the Chinese people in the war of resistance against Japan's war machine and had, together with the other principal Allies, contributed substantially to the founding of the United Nations, which, as a matter of historical record, was not conceived as a universal institution open to all comers but only to those states which have the qualifications for mem-

\* Adviser to the Embassy of the Republic of China to the United States.

bership as stipulated in the Charter. This is the Government of the Republic of China, whose temporary seat of administration is now in Taiwan Province, which is also Chinese soil. This is the only government that can give expression to the authentic aspirations of the Chinese people and represent them in the United Nations as well as in other international organizations. There is a continuity of governmental leadership and of national policies. The occupation of the Chinese mainland by the Communist insurgents does not change these facts.

(4) Now those who favor the admission of the Peiping regime to the United Nations usually maintain, among other arguments, that the principle of universality should be observed. Such a stand reveals a gross disregard of the history of the United Nations as well as the provisions of the Charter. The so-called principle of universality was never adopted during the Dumbarton Oaks meetings or at the San Francisco Conference. I am sure that this audience knows very well that it was not intended by the authors of the Charter that numerical or mechanical universality should be the principle for participation in the United Nations.

It does not mean, however, that the Organization should be a closed one; but the proposal for universality should not be carried out in violation of the purposes and provisions of the Charter. Here attention should be called especially to the preamble and Articles 1, 2 and 4 of the Charter, according to which membership is open to all peace-loving states if they accept the obligations contained therein and if, in the judgment of the Organization, they are able and willing to carry out these obligations. And now we are told by Professor Cohen, a supporter of Peiping, that "the burgeoning support for Peking undoubtedly marks a rejection of vague, value-laden criteria such as whether a claimant is 'peace-loving', 'willing to carry out [Charter] obligations', and 'dedicated to Charter principles' . . ." His point of departure is to put emphasis on the "criteria for decision," but he proposes almost in the same breath to throw them overboard.

(5) If one were to read carefully these and other relevant provisions of the Charter and examine the record of the Chinese Communist regime, one cannot but draw the conclusion that it has none of the qualifications. The Communist control of the Chinese mainland was brought about by force and violence and it has been maintained that way, although tenuously. It aims at world revolution by violence and has continuously sought to subvert and overthrow the governments of the free world. Its record of subversion and providing assistance and operational guidance to revolutionary groups in countries in Asia and other continents is too well known to call for any elaboration. It is because of this notorious record that the regime has suffered serious diplomatic reverses in many parts of the world.

(6) Peiping's aggression in Korea is still fresh in people's memory. From the end of October, 1950, it deployed an aggregate of some 350,000 men in Korea, creating an entirely new war in addition to the armed aggression of North Korea against the Republic of Korea in the South. It was for this reason that the Assembly of the United Nations passed a resolution on February 1, 1951, declaring that the Chinese Communist regime

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"has itself engaged in aggression in Korea," and calling upon "all states and authorities to refrain from giving assistance to the aggressors in Korea." The Assembly passed also other resolutions, notably the one on May 18, 1951, providing for "additional measures" to be taken to meet the aggression in Korea. It is to be noted here that Peiping is still at war with the United Nations itself, for there is only an armistice and no treaty concluding the Korean War. In view of the provisions of the U.N. Charter just referred to, no country in the international community with a record like that of the Peiping regime would be eligible for membership. Articles 5 and 6 of the Charter deal with the suspension of membership and expulsion of Members from the organization. Should a Member of the United Nations have violated so many principles of the Charter as Peiping did, it is liable to sanctions as provided for in these articles.

(7) Here, there is another legal situation which has generally been overlooked by both Member States of the United Nations and publicists. The United Nations resolutions of 1951 mentioned above belong to the category of "enforcement actions" against intervention and aggression, but few Member States have observed them. Even the Member State which had observed these resolutions is now relaxing her enforcement measures. This situation stems from the stipulation in Article 2, par. 5, of the Charter, which reads that "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." The failure to carry out such an obligation is not a trivial matter, because the U.N. Charter is a solemn treaty voluntarily entered into by the Member States pursuant to their respective constitutional procedures. According to Article 103 of the Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail."

(8) We are conscious of the fact that China is sometimes referred to as a "divided country." This, I believe, is the reason why there is a panel at this annual meeting of the Society on "Chinese Participation in the United Nations." The dichotomous situations are caused by the encroachment and expansionism of international Communism, but the case of China is essentially different from those of Germany, Korea and Viet-Nam. Although it has lost control temporarily of the mainland portion of its territory (except the Kinmen and Matsu groups of islands), the legal government is still actively resisting and suppressing the Communist insurgents. The contest is still going on. Vigorous efforts are being made for the return to the mainland and appropriate preparations undertaken to overthrow the Communist regime in Peiping. That the Mao Tse-tung regime claims to be China does not change this fact. The situation on the Chinese mainland is one of armed rebellion. The struggle between the legal government and the insurgents is fundamentally domestic in character. The Government of the Republic of China is opposed to the concept of "two

Chinas" as well as to the notion of regarding the Chinese mainland currently under Communist control as "a new entity."

(9) The Government of the Republic of China is equally emphatic in its opposition to the idea of "one mainland China and one Taiwan." Proponents of such a policy usually attempt to throw doubt on the legal status of Taiwan and Penghu and to avoid making reference to, or to disparage the importance of, certain legal grounds on which the claim of the Republic of China to sovereignty over these territories is based. In our view, the title of the Government of the Republic of China is perfectly clear in spite of the fact that it was deprived of its legitimate right to participate in the San Francisco Conference where the Peace Treaty with Japan was signed. The title is firmly based on the long historical connections between China proper and these insular territories and on a number of official acts and documents, such as the Declaration of War by China on Japan (December 9, 1941) nullifying all the treaties, conventions, agreements and contracts concerning the relations between China and Japan; the Cairo Declaration (December 1, 1943); the Potsdam Proclamation (July 26, 1945); the Terms of Surrender by Japan (September 2, 1945); the Declaration of Sovereignty over Taiwan and Penghu by the Chinese Government (August 30, 1945) and the subsequent acts making these territories a regular province in October, 1945; the Treaty of Peace between the Republic of China and Japan signed on April 28, 1952, etc. The last-mentioned instrument states, among other things, that "It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war."

(10) The Instrument of Surrender is an important legal document, for it was signed by the representatives of Japan, the Supreme Commander for the Allied Powers, and the representatives of the United States, the Republic of China and seven other Allied Powers. It imposes on Japan, *i.e.*, "the Emperor, the Japanese Government and their successors," the "obligation" "to carry out the provisions of the Potsdam Declaration in good faith." Mention should also be made of the Imperial Rescript of the Japanese Emperor dated September 2, 1945, announcing to the Japanese people the acceptance of the Potsdam Proclamation and the surrender.

(11) The actions of the Allied Powers subsequent to the surrender of Japan are also of paramount importance; they have further strengthened the legal position of the Republic of China in Taiwan and Penghu. By virtue of the surrender the Far Eastern Commission was established. It was composed of the representatives of the United States, the Republic of China, the United Kingdom and the U.S.S.R., each vested with the power of concurrence in all decisions of the Commission (*i.e.*, veto power) according to its Terms of Reference, as well as a few other Allied Powers. In the course of its existence from February, 1946, to the eve of the San Francisco Peace Conference, it passed more than sixty "policy decisions," "in conformity with which the fulfilment by Japan of its obligations under the Terms of the Surrender" was accomplished. Many of these decisions have had far-reaching effects, ranging from such serious matters as the

imposed modifications of certain essential aspects of the Japanese Constitution, the Emperor Institution and the educational system to democratization and economic measures, such as the removal of industrial properties, the reshaping of the Zaibatsu and other requirements. From these facts it is quite clear that the Instrument of Surrender constitutes an important legal basis for the Allied actions affecting Japan, especially on account of the fact that this instrument embodies the Potsdam Declaration, which, as we are aware, carries the Cairo Declaration.

(12) A few words are perhaps in order about the non-participation of the Government of the Republic of China in the Japanese Peace Conference held in San Francisco, September 4-8, 1951. It was an arbitrary diplomatic maneuver and a great injustice to the Chinese people, which, in our judgment, should not affect China's right to what has accrued to her as a major Ally arising from the defeat of Japan, and cannot vitiate the facts of history and the legal bases on which the Chinese claim is founded. To make a long story short, negotiations among the principal Allies for a preliminary draft peace treaty with Japan should have been undertaken by the Far Eastern Commission; but, on account of Section VII of its Terms of Reference dealing with the power of concurrence by the four major members, the United States Government deemed it expedient that such negotiations should be undertaken outside the framework of the Commission. Negotiations were then carried on bilaterally between the diplomats of the United States and those of the principal Powers, including the Republic of China, for roughly three quarters of a year. But when invitations to the San Francisco Peace Conference were sent out in August, 1951, to fifty-five governments, the Government of the Republic of China was not among them. All efforts to reverse this unfavorable development were to no avail in spite of vigorous diplomatic representations and messages of protest, literally by the scores, from legislative bodies of the Government of the Republic of China and from Chinese civic organizations in Taiwan and overseas.

(13) It is regrettable that a small number of Chinese students and former students indigenous to Taiwan, who call themselves "United Formosans for Independence" have failed to understand the legal bases of Taiwan and to appreciate the great progress that has been achieved in that province in recent years. If they do understand and appreciate at heart, then the veracity of their assertions is really questionable. These so-called "Formosans" are also Chinese people, whose forebears came from the mainland, particularly Fukien and Kwangtung Provinces. Despite its separation for fifty years from the mother country as a result of the Treaty of Shimonoseki, there is in Taiwan a continuity of the Chinese heritage and traditions. From economic well-being and social betterment to the broadening of the democratic processes for all the people irrespective of provincial origin, there is marked progress in every field of endeavor.

(14) The fact that accomplished young men and young women irrespective of social backgrounds are able to come to this country to study is a strong testimony to the liberal and far-sighted policy of the Govern-

ment, which is anxious to give the best available opportunities to the young people of promise. These young people who have finished their studies should really follow the example of Dr. Thomas Liao, who in 1965 dissolved the "Independent Formosa Movement" in Japan, of which he was the leader, and returned to Taiwan, declaring that he had been misguided by parochialism and that he would join the common cause of national reconstruction and resistance to Communism.

Chairman Rusk thanked the speakers and asked if they had any questions or comments to direct to the other members of the Panel.

Professor COHEN commented that he would be all for a package deal but did not see how it would be possible to arrive at one. In his view, there were three interrelated issues to be considered: the United Nations question; diplomatic relations with Peking; and the status of Taiwan. Professor Bundy in his remarks suggested that, since China had changed its policy on many issues in the past, it might tolerate a two-China solution in the United Nations eventually. Professor COHEN asked Professor Bundy if at any time during the past twenty-two years the People's Republic of China had ever wavered in its position that it would be unwilling to enter the United Nations so long as there was any form of separate representation for Taiwan? He also recalled the United States' view of China's territorial integrity prior to the Korean conflict. Before June 27, 1950, the United States maintained that Taiwan was Chinese territory and that the United States could not interfere in the Taiwan Strait because to do so would be to intervene in a domestic civil war. We then reversed our legal position overnight, declaring that the status of Taiwan was undetermined and using this rationale to justify our intervention in the Taiwan Strait.

Professor GOODMAN stated that the real choice was not between the rival claimants but rather between seating Communist China on the Security Council with a full veto and preserving the United Nations' rôle in the maintenance of international peace and security. In his view, the United Nations would not be able to fulfill this rôle adequately if the People's Republic of China exercised a full veto in the Security Council.

Professor GOODMAN commented that, contrary to Professor Bundy's view, Charter amendment would not be that difficult if negotiations were successful. Professor Bundy's idea of a revolving Asian seat in the Security Council would require a Charter amendment in any case.

Professor GOODMAN also stated that the U.A.R. formula proposed by Professor Bundy was not an appropriate precedent. Syria was allowed to sit after the split but only because there was a general consensus that it should be seated. No such general consensus exists in the present case.

Professor BUNDY commented that indeed his views called for a Charter amendment in the future, but not as a condition for action now. The major difference was that he was in more of a hurry than Professor Goodman, and less in a hurry than Professor Cohen.

Professor LUNG-CHU CHEN replied to Mr. Tan that to say that Formosans were Chinese was to say the Americans were Europeans. He commented that the Taiwan independence movement was recognized as an important

issue by the Chiang Kai-shek regime. As an example, Thomas Liao, who was a spokesman of the Formosan independence movement in the 1950's, had attempted to enter the United States but was frustrated by the Outer Mongolian deal. President Kennedy had considered allowing Liao to enter but then changed his mind when the Chinese Nationalists threatened to veto the admission of Outer Mongolia. According to Professor Chen, the Nationalists backed down only when the United States agreed not to let Liao in.<sup>1</sup> Coerced by the Chiang regime to return to Taiwan in 1965, Liao was frustrated for lack of young followers, because he had represented only some of the older generation of Taiwanese, who looked to the past, not the present and the future. His coerced defection did not bring a halt to the Taiwan independence movement; on the contrary, with a new generation of Formosans assuming leadership, the Taiwan independence movement grew stronger than ever before, as evidenced by the formation in 1970 of the unified world-wide organization, The World United Formosans for Independence, with headquarters in the United States, and the branches in Canada, Japan, Europe and Taiwan. The global activities of the Taiwan independence movement are necessitated by Chiang's regime of martial law. Taiwanese patriots in Taiwan are interned and tortured in ever growing concentration camps.

As to the legal status of Taiwan, Mr. Tan referred only to the Cairo Declaration of 1943, and the Potsdam Declaration and the Instrument of Japanese Surrender; he did not mention the 1951 Peace Treaty with Japan whose international legal effect superseded all wartime Allied declarations insofar as there was incompatibility. According to Professor Chen, to be authoritative and effective, the initial wartime desire of the four Allied Powers to return Formosa to China would need to be incorporated into the 1951 Japanese Peace Treaty. However, this was neither put into effect nor endorsed by the 48 signatories to the Peace Treaty. While Japan's renunciation of her "rights, title and claim" over Formosa was made unmistakably clear in the Peace Treaty, the beneficiary of the renunciation was not specified. The prevailing expectation of the signatories was that the legal status of Formosa, though temporarily left undetermined, would be subject to future international settlement in the light of the purposes and principles of the U.N. Charter, particularly the fundamental principle of self-determination. For further elaboration of this issue, Professor Chen referred to his book with Professor Harold D. Lasswell, *Formosa, China, and the United Nations*.

Chairman RUSK commented that he had been involved in the negotiations concerning Outer Mongolia and that the United States had deferred the question of bilateral recognition of Outer Mongolia in exchange for the non-veto. He said he had never heard that Liao was involved in any way.

The CHAIRMAN then opened up the discussion for questions and comments from the floor.

Dr. WOLFGANG FRIEDMANN directed his question to Professors Cohen and Bundy as to the United States' strategy on the status of Taiwan. He said

<sup>1</sup> New York Times, Oct. 30, 1961, p. 1; Feb. 7, 1962, p. 40.

that there was a crucial difference between the status of Viet-Nam, Germany, and Korea on the one hand, and that of China on the other. The former three countries were now in effect divided into separate entities (North and South Viet-Nam, the Federal Republic of Germany (West Germany) and the German Democratic Republic (East Germany), North and South Korea). All these act as separate states, and are to differing degrees treated as such by each other and the outside world. Thus, the United States, in the *Pueblo* incident, recognized the 12-mile territorial sea limit claimed by North Korea. In the case of China, both sides assert claims to be the exclusive government for the whole of China. Balancing these claims, Communist China has an enormously greater claim than Chiang Kai-shek's Government. A possible strategy for the United States was, therefore, to vote for the seating of Communist China as the representative of China in the United Nations, including a permanent seat on the Security Council. The United States should, on the other hand, support the admission of Taiwan as a separate state, provided the Government of Taiwan abandons its claim to represent China. If it does not, the United States should withdraw its support. On the other hand, the Government of Communist China should be asked to forgo its claim to Formosa. If it refuses to do so, the United States could abstain in the vote on the accreditation of the Peoples' Republic of China in the United Nations.

Professor BUNDY replied that East and West Germany did indeed have *de facto* communication and relations, but that this was not the case between North and South Korea. Nor would Hanoi talk directly with Saigon in Paris (although this was on grounds of the illegitimacy of the Saigon regime, rather than a refusal to admit present *de facto* separation). He thought that Professor Friedmann's proposal was a little too legalistic to provide a helpful handle in negotiations, and would be regarded by many as a technical device to keep China out of the United Nations.

Mr. ARNOLD FRALEIGH said the question was essentially one of which government should represent China in the United Nations. Contrary to Professor Goodman's criticism of the credentials school, the question of credentials could be more serious than the authenticity of papers. For example, the dispute between the rival Congolese delegations sent by Kasavubu and Lumumba was decided as a credentials question, as was the issue presented by rival Yemeni delegations during the Yemen internal war. He asked Professor Goodman to suppose that Peking should send a delegation to the United Nations to wait outside the door of the General Assembly along with the representatives from Taiwan. In such a situation would not the General Assembly have to decide as a credentials matter which delegation to seat, and by a majority vote?

Professor GOODMAN commented that the situations in the Congo, Yemen, and Cambodia were easily distinguishable from the Chinese participation case, since neither Lumumba, Sihanouk nor the Yemeni Royalists had the same bases of power as the Nationalists have.

Dr. EGON SCHWELB commented on the present status of the "important



question" position. He asked how Professor Goodman envisioned a Charter amendment could be brought about in the present day by which the only Asian permanent member of the Security Council would be deprived of the right to veto?

Professor GOODMAN replied that labeling the question as one involving "representation" would not help. The authoritative resolution on point does not dictate decision in the Security Council, and does not stipulate whether it is necessary to choose between the two governments, or to seat them both. In reply to Mr. Schwelb's second question, Professor GOODMAN stated that he believed Charter amendment would not be difficult if a negotiated settlement were successfully worked out.

Professor ERIK SUR commented that he thought Taiwan should be considered a separate state. This state being a Member of the United Nations from the beginning, it can only be excluded if the requirements of the Charter are fulfilled. This obviously is not the case. Thus the People's Republic of China would be a *de jure* member of the Security Council. Under Article 23, five states are permanent members of the Security Council. The underlying idea was that a permanent member must be a big Power and, therefore, the People's Republic of China represents China.

Mr. TAO CHENG stated that the status of Taiwan had been defined. He disagreed with Professor Chen's analogy that if Formosans were Chinese then Americans would be Europeans, since Americans were a mixture of many cultures and races, whereas Professor Chen's blood was 100 percent Chinese. He felt that the failure to mention Taiwan in the Peace Treaty was simply a technicality to deal with the Cold War situation. He was in 100 percent agreement with Professor Cohen's view on the United States position on Chinese representation in the United Nations and believed that the Communist Chinese government could be persuaded to declare it would never use force to take Taiwan. However, so long as the Taiwan question was not peacefully settled, the United States must continue to recognize the Taiwan Government, no matter what the United Nations did.

Mr. RALPH PERKINS said that the documents of the Marshall Mission to China in 1946 are being published and would be available in a few months.

Mr. STEPHEN SCHWEBEL asked Chairman Rusk what he would do if he were Secretary of State?

Chairman RUSK said that in light of his personal views, he felt the United Nations would only gain if all gaps between membership in the United Nations and the real world situation were removed. In all cases of conflict both countries should be admitted. The recognition policy of the United States should reflect reality and grow toward a position where, once a state has been seated in the United Nations, it would have total recognition by all countries. He said that he favored a package deal and that through negotiations room could be found for both governments. He understood Mr. Tan's view of the sacrifice the Republic of China had made during the war but that Taiwan should try to adjust to the present-day situation.

Professor FRANZ B. GROSS wondered how Dag Hammarskjöld would have handled the situation of China and other divided countries. He commented that, in addition to Professor Bundy's ideas, there should be a new resolution by the United States or another country stating the exact conditions required for the divided countries, Germany, Korea, Viet-Nam and China, to become Members of the United Nations. Since China is a member of the Security Council, there should also be an amendment proposed to admit two more Asian nations—Japan and India—to the Security Council. The Federal Republic of Germany, after admission, might be added to the Security Council.

Professor BUNDY was sympathetic to this view but questioned whether the idea of the Asian additions could be realistically worked out. He thought the position might be over-stated.

Chairman RUSK said there was no time left for more questions and asked the members of the Panel if they wished to briefly summarize their views.

Professor COHEN said the two entities idea was a creation of the United States and that the intervention of the United States in the Taiwan Straits was the principal reason for the present separate existence of Taiwan. He felt it would be impossible to get the People's Republic of China to renounce the use of force against Taiwan, since that would implicitly concede that this was an international question, not a domestic squabble. He further commented that there was a great need for more rapid access to historical material so that we could understand the legal analysis that led us into the Taiwan Straits in mid-1950.

Dr. TAN observed that the opinions thus far expressed by the speakers and the other commentators were mostly political, while this Panel was held under the auspices of this Society, a society of legal scholars. Recapitulating that the Chinese Communist regime did not have the qualifications to be admitted to the United Nations according to the purposes and the stipulations of the Charter under Articles 1, 2 and 4, and recalling that there was no treaty terminating the Korean War, while the resolutions of the General Assembly dated February 1 and May 18, 1951, declaring that that regime "has itself engaged in aggression in Korea" and providing for "additional measures" to be taken to meet the aggression are still on the books, he pointed out that there was another legal situation, which had generally been overlooked by both the Member States of the United Nations and publicists. Dr. Tan said that the United Nations resolutions of 1951 belong to the category of "enforcement actions" against intervention and aggression, but few Member States have observed them. Even the Member State which had observed these resolutions is now relaxing her enforcement measures. This situation stems from the stipulation in Article 2, paragraph 5, of the Charter, which reads that "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." The failure to carry out such an obligation is not a trivial matter, because the U.N. Charter is a solemn treaty voluntarily

entered into by the Member States pursuant to their respective constitutional procedures. According to Article 103 of the Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail."

Professor CHEN reaffirmed his position that the disposition of Taiwan, a former colonial territory, that would affect the fundamental human rights of its 14 million inhabitants and threaten both regional and global peace and security was definitely no internal affair of China; it was, rather, a matter of grave international concern for which the United Nations must shoulder responsibility. The question of sovereignty over Taiwan was distinct and separate from that of China's seat in the United Nations. Any decision to seat Peking as the government of China in the United Nations should in no way prejudice Taiwan's status and should not foster the expectation that the use of force by Peking to conquer Taiwan would be permissible in international law, or could be tolerated or condoned. At stake is the future of the 14 million people who want, at long last, to control their own destiny, and in whom Taiwan's ultimate sovereignty resides. The principle of self-determination should be applied by assessing in an orderly and lawful manner, and if possible under United Nations auspices, the true wishes of the majority of the people on Taiwan.

Chairman Rusk thanked the members of the Panel and the audience and adjourned the session at 12:45 o'clock p.m.

## SECOND SESSION

Thursday, April 29, 1971, at 2:15 p.m.

### Self-Determination and Settlement of the Arab-Israeli Conflict

The session convened at 2:15 o'clock p.m. in the Presidential Ballroom of the Statler-Hilton Hotel, Ambassador Charles W. Yost, former United States representative to the United Nations, now of Columbia University, presiding. Ambassador Yost introduced the speakers, Professor M. Cherif Bassiouni of DePaul University, and Professor Leslie C. Green of the University of Alberta.

### "SELF-DETERMINATION" AND THE PALESTINIANS

By M. C. Bassiouni \*

#### "SELF-DETERMINATION" AS A GENERAL PRINCIPLE OF INTERNATIONAL LAW: HISTORICAL EVOLUTION AND RECOGNITION

The right of "self-determination" is the product of an evolutionary process which does not owe its existence to the grace of history, but developed in spite of it. Its manifestations were varied and diverse. At times, it was an exercise of community behavioral auto-determination, as in the case of the Greek *Polis* and the city-state, soon to evolve, in a different way with the propagation of Judaism, Christianity and Islam. The focus then was on a widening of the individual moral choice, but which, when exercised collectively, was "self-determination." The religious wars between Christian sects were predicated on a right of "self-determination" as recorded in such early treaties as the Treaty of Westphalia (1648).

The separation of Church and State and the emergence of doctrines of political freedom of choice resulted in writings and declarations concerning the rights of man. They caused the ideological struggle to move gradually from the religious to the political sphere, even though the distinction is immaterial in this context.

The successive wave of human thought and events which advanced the notion of collective "self-determination" started amidst theories of political freedom and socio-economic justice. The emergence of choice of government doctrines and popular representation in the decision-making process of states was but the start, soon to be followed by notions of popular representation and constitutional control of the organs of power. All of these remained in the sphere of individual freedom of choice and did not rise to the level of the right of "self-determination." It was not until the "people" had state-making power that the right of "self-determination" was manifest. Not every group, however, constitutes a "people": "Only

\* Professor of Law, DePaul University.

*that group of individuals who feel commonly bound by certain factors of some permanency, and whose collective behavior reveals that they share certain value-oriented goals which they are desirous of implementing."*

These "commonly binding factors of some permanency" have not always been the same, but any known community was invariably predicated on any one or a combination of the following factors: religion, race, culture, language and political ideology. Nationalism invariably consisted of a combination of these factors, but nations seldom consist of a cohesive group linked by identical factors. Whenever sufficient commonly binding factors gave rise to a nationalistic concept, the latter in turn generated its own "common binding factors." The grouping of diverse "collectivities" into a single political entity, *i.e.*, a state, presupposes the existence of "*socio-economic-political structures capable of allowing the co-existing pursuit of whatever ideological differences are combined under that umbrella.*"

The advent of the League of Nations saw the application of the principle of "self-determination" to "nationalities" as a question of minorities' rights—a theme which the United Nations subsequently pursued as one of human rights. History reveals, however, that, whether religious or political, "self-determination" is the framework of a value-oriented inquiry.

Unfulfilled declarations on "self-determination" were numerous between 1914 and 1945. The notion was used as a pretext for Germany to invade Czechoslovakia and as a basis for the victorious allies to decide the fate of Europe in the Declarations of Yalta and Potsdam. "Self-determination" was announced in 1945 as a policy of the United States in keeping with the Wilson Doctrine and proclaimed to be a policy principle of many a nation, among which were Western European countries that continued their colonial policies and practices undaunted by this proclaimed right. It was stated as an objective of NATO by its member states and heralded at San Francisco, to be finally enshrined in the United Nations Charter. Indeed, Articles 1(2) and 55 of the Charter state it explicitly, while Chapters XI, XII, and XIII, on non-self-governing territories and the trusteeship system, embody it in spirit, and their provisions designated *inter alia* to attain that goal. The International Covenant on Civil and Political Rights explicitly states: "All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development . . . [and] freely dispose of their natural wealth and resources." All of which ultimately evidences the recognition attained by this principle, even though it is still not undisputed.

History clearly reveals a consistent trend of still growing acceptance by the common morality of mankind of "self-determination" as a general principle of international law. This is clearly evidenced by the recognition given thereto in treaties, declarations, public pronouncements by state officials, writings of scholars and its embodiment in the United Nations Charter. The actual practice of states, particularly colonial and neo-colonial states, does not demonstrate that the right, though recog-

nized in principle, has been applied voluntarily or consistently. It is certainly conceded that "self-determination" is not part of customary international law, since the custom and usage of member states of the world community do not evidence it by their practice. If that were the case, however, and "self-determination" were practiced as a customary matter, the question of its existence would be moot in light of the challenges it still meets.

The prolific history of General Assembly resolutions has certainly exhibited a recurring and confirmed adherence to the principle by those states who voted for these resolutions. Considering, therefore, the law and practice of the United Nations and the previous history of "self-determination," as a right to exercise collective behavioral freedom of choice, the conclusion is warranted that it is a general principle of international law recognized by the world community even though not always applied.

#### *Nature of the Right*

*"Self-determination" is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle it can be enunciated without reference to a specific context; as a right it is operative only in a relative context, and as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate.*

"Self-determination" becomes a right whenever: a given collectivity is prevented or seriously impeded from freely adhering to or exercising its values, beliefs and practices on the indigenous territory which they inhabit (or from which have been removed) by another collectivity by coercive means.

The inarticulate premise of that right is the existence of conflicting value-oriented beliefs and practices of two (or more) collectivities on a given territory where the "socio-economic-political structures do not permit the relatively unimpeded co-existing pursuit" of these divergent beliefs and practices.

The right of self-determination is, therefore, born out of conflict between two collectivities who have opposing ideological contentions and the implication is that, whenever such a conflict arises but is not channeled through "structures permitting their relatively unimpeded co-existing pursuit" on that territory, then "self-determination" becomes: (a) the *right* relied upon by the oppressed group, and (b) the *resolutive* norm which grants the non-dominant party the choice of an uncoerced determination.

A cursory review of the types of issues in which the right was invoked reveals that it was claimed as a basis for the following: as a right to internal revolution—as grounds for cessation—as a claim for unification of peoples—as a claim for unification of people and territory—as a claim for choice of state affiliation—as minorities' rights—as means for acquisition of territory—as a human right. Whatever the claim relied upon, there are invariably two co-existing interrelated factors: *people and territory*.

A central question remains to be answered with respect to the nature of such a right: Is it a peoples' right or is it a territorial right exercisable by those within its confines? In the abstract, people determine their goals regardless of geographic limitations; however, realistically, it is exercisable only when it can be actuated within a given territory susceptible of acquiring the characteristics of sovereignty which is a prerequisite for acquiring membership in the community of nations.

*Palestine and the Palestinians: A People and Its Territory \**

The area known as Palestine is bordered by the Mediterranean on the east, the Jordan River on the west, the Golan Mountains and the Sea of Galilee on the north, and the Negev and Sinai Deserts on the south. The Palestinians are descendants of Abraham, Semites by race, who have continuously inhabited that same area known as Palestine since time immemorial. Since 1948, after the creation of the state of Israel on that territory, they are living in forced exile.

Ever since 634, Semitic Arabs incorporated that region in the Islamic nation after defeating the Roman occupiers who in 70 A.D. had expelled the Jews. Few Jews had remained on that land since the Diaspora, but not all the inhabitants were Jews and not all Jews left Palestine. When the Arabs drove the Romans out of Palestine, they rescinded the decree of banishment from Jerusalem, but few Jews returned until the nineteenth century.

The territory and population of Palestine had always remained an identifiable entity from either the Roman Empire, the Islamic nation, or the Turkish Ottoman Empire. When the Turks were driven out of Palestine during World War I by Arab and British forces, England established, with the help of the League of Nations, a colonial regime in Palestine. The mandate system, even considering that it was a colonial device, spoke of the "provisionally independent state of Palestine," thus further underlining the identifiable character of the territory and its inhabitants. The mandate system was predicated on the existence of a Palestinian entity which, under the mandatory's administration, was to acquire complete independence. The administration of Palestine under the mandate reinforced that fact through the establishment of legislative, executive and judicial bodies. Palestine had a flag, its nationals carried passports recognized abroad. In effect, with the exception of foreign affairs and subject to the internal limitations imposed by Great Britain which exercised it in the same manner as it had in Egypt or India, Palestine had most of the characteristics of a state.

After 1947-48, the Palestinians, however, ceased to be a "people" and

\* The ideas and figures presented in this section have been introduced in Bassiouni, "The 'Middle East': The Misunderstood Conflict," 19 Kansas Law Rev. 373 (1971). See also, Bassiouni and Fisher, "The Arab-Israeli Conflict—Real and Apparent Issues: An Insight into its Future from the Lessons of the Past," 44 St. John's Law Rev. 399 (1970); Bassiouni, "Some Legal Aspects of the Arab-Israeli Conflict," in *The Arab Israeli Confrontation of June 1967* (ed. I. ABU-Lughod, 1970); *idem*, "The Middle-East in Transition: From War to War, A Proposed Solution," 4 Int. Law 379 (1970).

became refugees just as Palestine ceased to exist as an identifiable region. Between 1948 and 1969, Palestinians were almost uniformly treated as "refugees." Even the United Nations in its oft-reaffirmed resolution of 1948 (Res. 194) granting the "refugees" a right to return to their former homeland and to compensation for their lost property never admitted to the reality that these refugees constitute a "people."

As further evidence of the continued misunderstanding of the United Nations' perception of the nature of the problem is Resolution 242 of November, 1967, wherein the Security Council referring to the Palestinians stated: "2. Affirms further the necessity . . . (b) for achieving a just settlement of the *refugee problem* . . . ." [Emphasis added.] The Palestinian people rated one line and the dignified label of "refugee problem." It was not until December, 1969, that a General Assembly resolution finally recognized for the first time the Palestinian people as a fact and spoke of the "*inalienable rights of the Palestinian people*."<sup>1</sup>

#### THE DEMOGRAPHIC CONTEXT OF THE RIGHT OF SELF-DETERMINATION IN PALESTINE AND THE UNITED NATIONS

At the time Lord Balfour responded to a letter from Baron Rothschild in 1917, the population of Palestine was approximately 90 percent non-Jewish. The Balfour Declaration, mindful of the Arab character of Palestine, promised to facilitate the establishment of a "National Jewish Homeland in *Palestine*" [emphasis added] to Jews willing to immigrate there, but sought to safeguard the rights of the Arabs and did so in these terms:

It being clearly understood that nothing shall be done which may prejudice the civil and religious rights of non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

A Jewish national home was contemplated then by all parties concerned as the establishment of a Jewish minority, endowed with the right to pursue its religious and cultural heritage in freedom and peace. The outcome was to be quite different. Immigration quotas were imposed by the colonial Power (Great Britain), then increased by political pressure from Zionists and sympathizers as well as anti-Semites who saw in the contemplated "National Jewish Homeland" a way to rid themselves of Jewish minorities. Great Britain never entertained the notion that Jewish immigration could be allowed against the will of the Arab inhabitants, and when it reached such proportions as to change the Arab character of Palestine it declared in 1939 that the entire population ratio was to be kept at the level it had reached of one third Jewish and two thirds non-Jewish Arabs. By 1947, after an onslaught of post-World-War-II illegal immigration, the Jewish population was estimated at about 700,000 to an estimated 900,000 non-Jewish Arabs. In some twenty-five years, Arabs who had constituted 90 percent of the people of Palestine became barely some 55 percent, even though they still owned over 80 percent of the land and

<sup>1</sup> Res. 2535 (XXIV), U.N. General Assembly, 24th Sess., Official Records, Supp. No. 40.



most of its commerce and industry. Arab sources consider, however, these estimates to be inflated.

Consider two factors: (1) the demographic transformation was imposed by a foreign colonial Power, Great Britain, and abused by illegal immigration, and (2) the process of determining the will of the "people" was based on an estimated head count of those who were physically present in Palestine without distinction as to the juridical status of those persons (who could have been immigrants, deportable aliens, tourists, foreign citizens and nationals). Notwithstanding these two factors, the United Nations decreed the partition of Palestine into a Jewish and an Arab state. The Jewish state was given approximately 56 percent of the territory of Palestine, soon to be enlarged after the 1948 war to include another 23 percent of Palestine (of that portion of Palestine which the Partition Plan had allotted to the contemplated Palestinian Arab State).

The United Nations considered in the formulation of the Partition Plan two factors: (a) The inhabitants of Palestine could no longer coexist in peace; (b) There was roughly a 55 percent to 45 percent ratio between Jews and non-Jews in Palestine. On this basis, the United Nations could be said to have adhered to some form of self-determination when it imposed its Solomonian justice of splitting the territory roughly in two halves for what in its judgment represented approximately an equal number of persons who belonged to the two opposing collectivities. The United Nations further added the subsequent caveat of the right of the Palestinians to return in peace to where they had lived (if it had become part of the territory allotted the Jewish state), if they desired, and in any event to be compensated for their property.

The fallacy in that approach to the right of self-determination lies in that not all individuals or collectivities have a right of self-determination on any territory of their choice; only those people who have a legitimate right to a given territory can exercise it on that same territory. The right of self-determination accrues to a given people on a given territory with which they have a legitimate "link" and upon which their future political expectations can be realized. Therefore, some legitimate criteria for the determination of those who constitute this group called "people" and their relationship to the territory must be established. The test proposed is the existence of a "link" or "rational nexus" between the people and the territory, and this can be ascertained by a criterion of nationality (in applicable cases).

It is estimated that over one half of the 700,000 persons of the Jewish faith present in Palestine in 1947 who were estimated to constitute some 45 percent of the entire population of Palestine were not Palestinian nationals. Palestinian nationality did exist and was so recorded on official documents, including passports which were issued only to nationals. Assuming the validity of the estimate that one half of that group or approximately 350,000 were Palestinian nationals, then approximately one third of the entire population dictated the outcome of the future of Palestine against the express will of two thirds of the remaining nationals, which vitiates the argument that the partition was predicated on a modicum of

self-determination. This assertion is predicated, however, on the choice of a nationality criterion for the exercise of the right of self-determination and a majoritarian rule as the valid process.

The partition, in effect, foreclosed the Palestinians' right of self-determination by including in the category of "people" eligible to exercise it, persons who did not qualify under the nationality criterion. This criterion is obviously not the only one which could be devised, but certainly physical presence alone would not suffice either. It is advanced that a "right" of self-determination for the Israelis exists and is equal in dignity to the Palestinians' "right." This also presupposes that equal "rights" spring from equally legitimate sources. The Palestinians' claim that they are a "people" linked to that territory upon which they are entitled to exercise their right of self-determination, but that people of the Jewish faith cannot make an equally strong claim. Israel rather argues historical legitimacy, but in fact seeks to trade its military supremacy for recognition by treaty which would give it a color of legitimacy by condonation and foreclose any subsequent Palestinian claims predicated on "self-determination" at the state-making stage of its own creation. That is why the Palestinians claim that the exercise of the right of "self-determination" in Palestine is restricted to the population of Palestine prior to its radical demographic transformation between 1922 and 1947. They maintain that the mandate system and its successor, the trusteeship system of the United Nations, did not envision or permit a trust territory to be so administered by a trustee as to allow an imposed or forceful demographic transformation designed to alter the indigenous character of that territory and remove its original inhabitants. For the United Nations to act on the basis of imposed conditions (unauthorized foreign immigration) is in manifest derogation of its obligations to the original indigenous population and their legitimate rights to the protection of which it is pledged as a "sacred trust of civilization."

The right of self-determination in this case should have been considered by the General Assembly when it decided on partition to be in accordance with legitimate criteria determined by the rights and obligations arising out of the trusteeship system and its stated purposes to which it was morally and legally bound. That, it did not do. But in 1970, recognizing the existence of the Palestinian peoples' right to self-determination, it passed the following resolution.

*Recognizing* that the problem of the Palestinian Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights,

*Recalling* its resolution 2535B (XXIV) of 10 December 1969, in which it reaffirmed the inalienable rights of the people of Palestine,

*Bearing in mind* the principle of equal rights and self-determination of peoples enshrined in Articles 1 and 55 of the Charter of the United Nations and more recently affirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>2</sup>

<sup>2</sup> Res. 2625 (XXV), U.N. General Assembly, 25th Sess., Official Records, Supp. No. 40 (A/8013), p. 30.

1. *Recognizes* that the people of Palestine are entitled to equal rights and self-determination in accordance with the Charter of the United Nations;

2. Declares that full respect for the inalienable rights of the people of Palestine is an indispensable element in the establishment of a just and lasting peace in the Middle East.<sup>3</sup>

APPLICATION OF THE RIGHT OF SELF-DETERMINATION TO THE  
PALESTINIANS AND THE RELATIONSHIP BETWEEN  
"PEOPLE" AND "TERRITORY"

The right of self-determination as stated above presupposes the existence of two interrelated factors: *people and territory*. The Palestinians are no longer physically present on the territory on which they claim they once had a right of self-determination. The two elements of territory and population have been severed by the coercive displacement of the Palestinian population from that territory. Does that fact extinguish the right? It must be noted that what is claimed by the Palestinians is not a right of "self-determination" arising only in the present or after their displacement in 1948 from Palestine, but a right which existed at the time the mandate was established and never terminated. The main tenet of this position is that legitimate rights such as "self-determination" are not extinguishable by the coercive displacement (or preventing the return) of the "people" from the "territory" after the right has accrued to this very "people" on that very territory.

This proposition, therefore, rejects a post-1948 right of self-determination which would link the Palestinian people to territory other than that which Israel carved out of original Palestine. This is the position of the Palestine Liberation Organization which was expressed in Article 6 of the 1968 Palestinian National Covenant: "Jews who were living permanently in Palestine until the beginning of the Zionist invasion will be considered Palestinians."

1923 was chosen as the cut-off year by the P.L.O., because in their opinion it is the commencement of the Zionist invasion. That cut-off date is, however, debatable since Palestinian Arab representatives agreed in the ensuing years to an immigration quota which allowed for the lawful entry of many European Jews.

The population of Palestine, which under this argument would constitute the "Palestinian people" entitled to the exercise of "self-determination," is estimated to be one third Jewish and all that must be taken into account. Assuming the validity of the proposition that one third of the population consisted of Jews eligible to choose partition, the Partition Plan as it relates to territorial apportionment is also defenseless, as it gave the Jewish state 56 percent of the territory of Palestine.

What, then, is the remedy for a "people" whose right of "self-determination" was violated? A right to return—this was indeed established by United Nations General Assembly resolution but never enforced.

<sup>3</sup> Res. 2672 C (XXV), *ibid.*, p. 4, Dec. 8, 1970.

## CONCLUSION

The Palestinians are a people whose right of "self-determination" has been violated. The Palestine Liberation Organization proposes a political solution: *The establishment in Palestine of a secular, democratic, progressive society without distinction or discrimination as between Jews, Christians, and Muslims.* This is rejected by Israel, which continues to be essentially a creature of world Zionism, designed to maintain its exclusivist character for the alleged benefit of world Jewry. The two diverse collectivities (Jewish and non-Jewish) maintain opposing and conflicting ideologies and are not likely to be reconciled without the transformation of the "socio-economic-political structures" of Israel "to allow for the peaceful coexisting pursuit" of the views of these two collectivities. Interestingly enough, all of Palestine and half of the Palestinian people are now under Israeli control. If Israel were *not* to return the West Bank and Gaza to Jordan and Egypt and the Palestinians living thereon would remain on these territories, their original claim to "self-determination" would end. Only two issues would remain pending: (1) the right of return for the balance of the Palestinians, and (2) guarantees of implementing human rights available under international law to the Palestinians residing in Israel-Palestine.

Most writers and political pundits assume that the West Bank and Gaza must or will be returned to Jordan and Egypt and some speak of a separate Palestinian state on these territories. Considering that the Palestinians are not parties to the Jarring talks and that they are not parties to Resolution 242, only Jordan and Egypt can be the recipients of these territories if and when they are to be returned by Israel. Several worthwhile plans have been submitted and discussed concerning the establishment of a Palestinian state, an Israeli-Palestinian commonwealth as proposed by Professor Gottlieb, or a Sinai-Gaza trusteeship by Professor Reisman. These proposals ignore the reality that Israel controls these territories and will relinquish them in whole or in part only to states, Egypt and Jordan, in exchange for whatever *quid pro quo* they may secure. Israel will not create a Palestinian state, and it is my estimate that neither will Jordan or Egypt. That leaves the Palestinians themselves, who are not, in my opinion, in a position nor are they willing to establish a state on either or both of the territories in question. The next best thing to a protracted guerrilla war may well be if Israel would not return the West Bank and Gaza and if the United Nations would cause Israel to return the remainder of the Palestinians, Israel would then become a pluralistic society, and, with equal rights in this pluralistic society to all, Jews and non-Jews, the present conflict would be resolved.

The "right of self-determination" would be implemented by a return of all Palestinians to what was their homeland. The only issue would be whether Israel would establish a democratic pluralistic society.

Hope more than realism leads me to assert that even if Palestinians would not at first be equal to Israeli Jews, it would be a matter of time

until the two collectivities would produce these socio-political-economic structures capable of allowing the coexisting pursuit of their respective beliefs and practices with reciprocal due allowances.

## SELF-DETERMINATION AND SETTLEMENT OF THE ARAB-ISRAELI CONFLICT

By L. C. Green \*

To the politically naïve, there is something attractive in the suggestion that all problems concerning multinational relationships or difficulties might be solved by applying the so-called principle of self-determination. Partisans of this view seem oblivious, or careless, of the fact that self-determination, or for that matter the plebiscite, is unknown to customary international law. They appear to assume that since there is now a tendency to describe self-determination as a fundamental right, inherent in men as such, then it must operate retroactively, regardless of the effects this may have on established situations or a recognized *status quo*.

If one looks at the standard writings on international law there is no reference to self-determination, or to anything that might be construed as its equivalent. Care must be taken not to confuse the fact that classical international law does not forbid a right to rebellion, with consequential recognition of the newly established authority, with what we now regard as the right of self-determination. In the same way, classical international law has conceded that rights and a title to sovereignty flow from conquest or usurpation. In neither case has there been any undue concern with the popularity of the government or the ideological basis on which it has been established. All that we have achieved by recent developments is that title by conquest is probably inconsistent with the Charter of the United Nations, at least if the process by which it was secured amounts to aggression. On the other hand, international law still concedes that an existing state may disappear by reason of *debellatio*. While the history of Nazi and Fascist expansion during the inter-war years shows that, despite the alleged outlawry of wars of aggression by the Kellogg-Briand Pact, states are still willing to recognize changes brought about by illegal action, accepting that what might appear to be itself an illegal act has the effect of legalizing the fruits of the prior illegality. Even the post-Charter period offers numerous examples of changes in sovereignty brought about, perhaps without actual resort to force, but equally without over-much consideration for the wishes of the population concerned. This cavalier attitude to fundamental rights has been demonstrated even by Members of the United Nations who, presumably, are committed as Members of that Organization to the "principle of equal rights and self-determination of peoples." It can hardly be contended that excessive concern was shown for the principle of self-determination or its application in such instances as the division of the founder-Member India into India and

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Pakistan; the union of two independent Members, Syria and Egypt, as the newly-created United Arab Republic; the absorption of West Irian by Indonesia, which had itself "evolved" from the United States of Indonesia into the Republic of Indonesia, regardless of the rights of, for example, the Ambonese or the South Moluccans; Biafra and Bengla Desh; or the disappearance of certain British protectorates and their fusion with newly-established Commonwealth countries, regardless of the fact that the local inhabitants might have preferred to resume their independence rather than become a minority group governed by a rival tribe.

Despite the ideological attraction of political self-determination as exemplified by the American Revolution, international law still did not recognize that there was any such thing as a right to self-determination in the sense that it is now understood, and attempts to bend the concept of non-intervention into such a right show rather the lack of legal foundation in the contentions of those who put forward such arguments. The nearest one gets to anything that may rightly be called recognition of a group lies in the recognition of minority rights, but even here it would appear—and the jurisprudence of the World Court confirms this—that, in the absence of specific treaties, or perhaps of unilateral declarations made in circumstances that create an international undertaking, a minority enjoys no special privileges and no special protection. In both types of case, however, the right to self-government or equal treatment seems to be confined to existing national boundaries. At most, it would allow the overthrow of a foreign rule—if, that is, the home government in London could really count as a group of foreign rulers over British colonists—or a change in the established government, or equal treatment of a group of citizens with the majority. In none of these would it permit the overthrow and disappearance of an existing state, although it might result in the conversion of a ruling minority élite into a non-privileged subject group.

It was not until Wilson propounded his Fourteen Points that self-determination became of any real significance on the international scene. Even he, however, was largely concerned with dissolving the empires of the former Central Powers or liberating territories which had been occupied, and it was in accordance with such adjustments that specific references to "recognizable lines of nationality" or "freest opportunity of autonomous development" were included, and care must be taken that this fact be borne in mind and the references not be generalized. The only general mention of a principle of self-determination occurs in Article 5, but even this was more narrowly confined than has sometimes been implied. Wilson was not talking of independence, but of the adjustment of colonial claims as among the victors:

A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.<sup>1</sup>

<sup>1</sup> 13 A.J.I.L. 161 (1919).

The Versailles Conference clearly appreciated the limits of Wilson's Point, when it refused to include any reference to racial or religious equality in the Covenant and gave short shrift to the views of such Asian spokesmen as Nguyen Ai Quoc (Ho Chi Minh).<sup>2</sup> As for the Covenant, all that it conceded to the idea of self-determination was the reference in Article 22 that, insofar as former enemy territories were being placed under mandate, "the wishes of these communities must be a principal consideration in the selection of the Mandatory"—hardly what might be described as recognition of any right of self-determination. For this reason there is little point in referring to the various statements made by Wilson before Congress or elsewhere, or even his expressions of support for government by consent. All such statements, like those of any politician, unless made in circumstances which indicate that they represent undertakings given by his country to another, as in the case of the Ihlen Declaration, are mere declarations of policy lacking any legal significance.

It is true that even in the nineteenth century some treaties of cession provided for a plebiscite of the inhabitants before the cession could be finalized, but these related to the transfer of sovereignty over the territory from one Power to another, and not to any right of independence or self-government. In other cases provision was merely made to enable the population of a territory which felt that it was under the wrong sovereignty to exercise a right of option. Similar provisions were to be found in some of the post-1919 Peace Treaties, while France would not accept the cession of Tenda and Briga in accordance with the Peace Treaty with Italy until after a plebiscite.<sup>3</sup> But such provisions were the exception rather than the rule. Thus, at the time of the cession of the Danish West Indies, the United States made it perfectly clear—as clear as Indonesia did later with West Irian—that she would never concede to the local inhabitants the right of deciding upon the proposed transfer.<sup>4</sup> In later years, India behaved in much the same way with regard to Goa, although in this case the new sovereign contended that it was putting right an historical wrong and reuniting the territory with its motherland and the inhabitants with their co-nationals.

Insofar as Wilson's concept of self-determination concerned the internal situation in any state, particularly one in which the government had come to power by revolutionary action, it must be remembered that the idea of legitimacy as being essential before the United States would extend recognition in no way constituted a legal obligation of prior non-recognition upon the United States. The history of the recognition policies of the United States since then shows that this constituted a statement of policy that might or might not be followed, as circumstances dictated. While it imposed no legal obligation upon the United States,<sup>5</sup> it equally imposed none on any third country, nor could it be alleged so to do.

<sup>2</sup> The Times (London), Sept. 16, 1969.

<sup>3</sup> I Oppenheim, *International Law* 552, note 2 (1955).

<sup>4</sup> I Hackworth, *Digest of International Law* 422-423.

<sup>5</sup> See Chen, *International Law of Recognition*, Ch. 5 (1951).

The issue again became important during the second World War when Roosevelt persuaded Churchill to include in the Atlantic Charter a statement of respect for "the right of all peoples to choose the form of government under which they will live." But Churchill soon made it clear that Britain did not regard this as constituting a legal obligation, nor even a policy statement that was effective with regard to the non-self-governing parts of the British Empire.<sup>6</sup> The campaign for self-determination was carried further at San Francisco when the Soviet Union was successful in having embodied a reference to the "principles of equal rights and self-determination of peoples" embodied in the Purposes of the United Nations, with Molotov making it clear that his government had the colonial peoples and the mandated territories in mind.<sup>7</sup> What the participants in the Conference had in mind appears from the Report of Committee I to Commission I:

The Committee understands that the principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct; that the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace; that an essential element of the principle in question is a free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years.<sup>8</sup>

If this be the case, there is little ground for arguing that the delegates at San Francisco were really concerned with what is now known as the right of self-determination. On this Kelsen comments that the article concerned refers to relations among states, and

therefore the term "peoples", too—in connection with "equal rights"—means probably states, since only states have "equal rights" according to general international law. That the Purpose of the Organization is to develop friendly relations among states based on respect for the principle of self-determination of "peoples" does not mean that friendly relations among states depend on democratic form of government and that the purpose of the Organization is to favour such form of government. This would not be compatible with the principle of "sovereign equality" of the Members, nor with the principle of non-intervention in domestic affairs established in Article 2, paragraph 7. If the term "peoples" in Article 1, paragraph 2, means the same as the term "nations" in the Preamble, then "self-determination of peoples" in Article 1, paragraph 2, can mean only "sovereignty" of the states.<sup>9</sup>

Even without this interpretation, there is ground to argue that the Charter does not grant any specific right to any entity—individual human being or group of them—other than to the states which are parties to it.

Apart from the vague reference to be found in the Preamble and the Statement of Purposes, the only concessions to anything that may be de-

<sup>6</sup> House of Commons, Sept. 9, 1941, 374 Hansard, cols. 67-69.

<sup>7</sup> New York Times, May 8, 1945.

<sup>8</sup> 6 UNCIO Docs. 455.

<sup>9</sup> The Law of the United Nations 52 (1951).



scribed as a right to self-determination to be found in the Charter appear in Article 55 relating to international social and economic co-operation, asserting that friendly relations between nations are "based on respect for the principle of equal rights and self-determination of peoples," and again in the Declaration regarding Non-Self-Governing Territories, which pledges administrators of such territories "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions." It would seem that the first of the two references has nothing to do with self-determination in the modern sense, but is concerned rather with respect for sovereignty and each nation's right to pursue its own social or economic policy, with the word "peoples" being a synonym for "nations." As to the later reference, this is clearly confined to colonial territories governed by a foreign Power, which is called upon to assist the local inhabitants in becoming a separate state. Since South Africa was a founding Member of the United Nations, and since the Charter guarantees freedom from interference in domestic affairs, and implies respect for territorial integrity, it is to be presumed that Chapter XI of the Charter could not have referred in any way to a country in which discrimination was practiced or democratic rights were denied to part of the population, if the ruling minority was one which regarded the territory in question as its home and which exercised the rights concomitant upon independence and self-government.

It is not surprising that the Charter said so little of a concrete character in regard to self-determination. This was fully in keeping with the views of those who had been Members of the League of Nations. The Commission of Jurists which had been set up to deal with the Aaland Islands dispute commented:

Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations. On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. . . . To concede to minorities, either of language or religion, or to any fraction of a population, the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within states and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of a state as a territorial and political unity.<sup>10</sup>

<sup>10</sup> League of Nations Journal, 1920, Spec. Supp. No. 3, p. 5, and Report of Commission Rapporteurs, April 16, 1921, Council Doc. B 7, p. 28.

In the early days of the United Nations, the Members were not unduly worried about the existence of a right of self-determination, for they were more concerned about the rights of people than of peoples, and there is no reference to such a right in the Universal Declaration of Human Rights. The nearest to be found there is a right to participate in elections; but with the impact of the winds of change, the increasing criticism of *apartheid* in South Africa and the growth in the number of newly independent states, a change in emphasis set in. With increasing regularity the General Assembly from 1950 on, and usually over the opposition of the older states, adopted resolutions concerning self-determination. By 1962 it was declared that "all peoples have an inalienable right to complete freedom [presumably, therefore, they cannot exercise their right of self-determination in order to combine with another state or place themselves in a position of dependency vis-à-vis another state], the exercise of their sovereignty and the integrity of their national territory. . . . All peoples have the right of self-determination; by virtue of that right they freely determine their political status [and this presumably would include their right to surrender their 'inalienable' freedom] and freely pursue their economic, social and cultural development."<sup>11</sup> This and other similar resolutions adopted by the General Assembly are, however, nothing more than recommendations, even though they may enjoy some measure of moral force. To the extent that they may have been regularly voted for by the same states may indicate that these states considered themselves to be obliged to recognize such rights, while a consistent practice over a period of years might indicate the development of a new rule of customary law to this effect, although it is doubtful how far this would bind any Member which had voted negatively or had consistently abstained, and there would be even less legal effect insofar as non-Members of the United Nations are concerned. Moreover, the fact that there may have developed such a rule of international law with regard to the right of self-determination does not mean that it has always existed, and it is perhaps doubtful whether the recognition of such a right could operate retroactively.

Eventually the General Assembly affirmed its belief in the right of self-determination by embodying such a right as the first in both the Covenants on Human Rights adopted in 1966. These affirm that the rights to which they refer "derive from the inherent dignity of the human person," and declare that

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.

This latter portion of the article suggests that once again the reference is to the right of a "people" able to participate in international co-operation,

<sup>11</sup> U.N. General Assembly, Res. 637 (XVII).

to possess natural wealth and be bound by the obligations of international law; in other words, that "peoples" are "nations" are "states." In any case, great caution is necessary when approaching these Covenants, for by the end of 1969 they were still signed by only a minority of the Members of the United Nations, not including Canada, France or the United States, and, of the 35 ratifications necessary to give them legal effect, only six had been deposited.

It would appear from the above that, despite the statements of politicians or of partisan commentators, there is still no right of self-determination in positive international law, although since 1966 there may be one *in nascendi*. It is insufficient for a non-binding document to declare that the right is inherent when practice shows that has never been regarded as the case. After the document comes into force it may be possible to argue that from then on the right is to be regarded as inherent for the future, but it is difficult to see how this can be interpreted to apply retroactively or to destroy existing recognized states, especially as no attempt has really been made at any time to say what is meant by the "peoples" who are supposed to enjoy this inherent right.

But even if there were such a right, what would be its significance in the Middle East as between the Arabs and Israelis? The area in conflict is Palestine, and therefore the problem has to be examined in the light of the position of the inhabitants of the territory that was dealt with under that name by the United Nations, and one may correctly ignore any contentions now put forward to suggest that the issue is one of Israel and the "Arab lands," nor is one entitled to deal with the problem on the level of the "Arab people," even if that term is now acquiring for some states more than a racial, political or ideological significance. After all, the world rejected the Nazi claim for self-determination of all those alleged to be of German origin, and even today there is no recognition of the claim to *Heimat* that is sometimes put forward in respect of displaced Germans.

Until the establishment of the Mandate, Palestine was part of the Turkish Empire and its residents were Turkish nationals. Had the area been handed over to Britain, they would have become British regardless of their own views or desires; but by placing the territory under Mandate the inhabitants became at most British-protected persons, being viewed on the international level as if they were British. Until the Mandatory introduced the Palestine Citizenship Order, 1925, there was no special nationality or citizenship affecting the inhabitants of the area,<sup>12</sup> and this Order conferred citizenship only insofar as the territory was concerned and so long as the inhabitants did not acquire any other citizenship. Thus, when a Palestinian citizen became naturalized as a national of Trans-Jordan, the Palestine Supreme Court held that he had lost his Palestinian citizenship and became an alien.<sup>13</sup> The Palestine Citizenship Order applied equally to

<sup>12</sup> See *R. v. Ketter*, [1940] 1 K.B. 787 (9 Ann. Dig. 46); Schwarzenberger, "British and Palestinian Nationalities," 3 *Modern Law Review* 164 (1939).

<sup>13</sup> *Jawdat Badawi Sha'ban v. Commissioner for Migration and Statistics*, (1945) 12 P.L.R. 551 (12 Ann. Dig. 15).

former Turkish citizens who were resident in Palestine, to those who were born in Palestine, regardless of the nationality or place of origin of their parents, and to those who acquired citizenship by naturalization, regardless of place of origin or of religious belief, and the Mandate had specifically instructed the Mandatory to facilitate the citizenship of Jews immigrating for the purpose of establishing a Jewish National Home in that territory.

Whatever may be the view today of the rights or wrongs of the Jewish National Home as envisaged by the Mandate, it cannot be ignored that, in the first place, historical *ex post* reasoning has little significance in the eyes of the law. If it did, interesting problems might arise in connection with every state which has been established by immigrants and of which the descendants of the aboriginal population are now claiming reversionary rights as "the original people." Moreover, the Mandate and its purpose were recognized by the Members of the League of Nations and such non-Members as the United States, that is to say, the bulk of those who made up international society at the time and whose practice has always been viewed as either creating, or as evidence of, international law. The fact that what has been created in this way may now be open to criticism by some or even be generally unpopular, would not in any way alter the legal validity of the situation thus created, for *quieta non movere*. Since then the United Nations has itself played a part in the legal evolution of the territory. First there was the resolution that agreed to the division of Palestine and the establishment of Israel and a separate Arab state, followed by the recognition of Israel and its admission to the United Nations. This admission meant recognition of the state by all Members, for membership is confined to states, all Members are bound to accept the decisions of the General Assembly in this field—one of the few in which the Assembly is able to reach a binding decision—and this obligation extends also to the Arab states which now are in rivalry with her and which contend that there is an Arab homeland including the whole of the former territory of Palestine which is entitled to enjoy self-determination. With the establishment of Israel, large numbers of Arab inhabitants of the territory which constitutes that state left, and it would indeed be a new interpretation even of the right of self-determination to allow such non-residents to participate in any exercise of franchise directed at deciding whether or not a recognized member of the international society was entitled to continue in existence. Insofar as the Arab inhabitants of Israel are concerned, they already enjoy what is normally regarded as the right of self-determination when exercised within a recognized state, for they enjoy the suffrage and equal political rights with the other inhabitants of Israel. From the point of view of international law they are Israelis, even though they may be of Arab ethnic origin. In any case, not every multinational state is considered as being ripe for a full exercise of self-determination if the consequence of such an exercise would be to break up the state into its alleged constituent parts, each measured by its tribal, religious, ethnic or racial composition.

What has been said so far relates only to those areas of the former Palestine which now constitute Israel, either because of the original resolution of establishment or because of acts of recognition by other states. It does not refer to any territories which may at present be under Israeli military occupation. In these territories there is ample basis for the right of self-determination to be exercised. So far, there has been no establishment of the Arab state envisaged when the Mandate terminated, nor have many of the territories involved been incorporated into existing states and recognized as such. Insofar as there has been such incorporation and the *de facto* boundaries of the incorporating state have been accepted, there is no more ground for the right of self-determination to be invoked than there is in the case of Israel proper. It is only insofar as it is necessary to establish boundaries of new territories in the Middle East, or to determine whether some of the areas now in limbo should be attached to an existing state, and if so which one, that any case for the invocation of such a right may be made.

It would appear that, despite the fanfares of propaganda which have accompanied certain United Nations resolutions, there is at present no legal right of self-determination. It is true that international law is a dynamic and evolving system; nevertheless such evolution cannot be allowed to take place at the expense of a state now in existence, especially if the aim is to destroy such state and particularly if the state is a Member of the United Nations. Any rule of law that develops from the present evolutionary process cannot operate retrospectively, but only *in futuro*. However desirable it may be politically to appear to be in favor of a so-called inherent right of self-defense, or however politically convenient it may be vis-à-vis certain states to invoke such rights, this does not affect the legal position. It may suit the politicians to contend that the Arab-Israel conflict must be settled in accordance with the principle of self-determination. But let us not pretend that this is on the basis of existing law.

### COMMENTS BY W. MICHAEL REISMAN \*

Mr. Chairman, Ladies and Gentlemen:

I am reminded of a strange creature in international law which I naively assumed to have become extinct. It was called the *lex lata* bird and distinguished itself from all others by the very strange habit of flying backwards. The reason it flew backwards was because it felt more comfortable where it had already been! We have been presented to different types of this ornithological creature this afternoon. Professor Green has flown us back very systematically through past trends. Because certain things happen in the past, he tells us, they bind our hands; we cannot do anything different in the future. Professor Bassiouni has flown off in a number of different directions. He has taken a selective collection of facts and set them into a teetering structure of "horizontal and vertical norms"

\* Yale Law School.

and "rational connections" and "nexuses" to justify a particular type of asserted self-determination. I submit to you that neither of these approaches represents a comprehensive approach to the problems that international lawyers encounter. They deal only with one or two intellectual tasks. As international lawyers, we are pressed in a case like this to respond to the claim of a group. One of the alternatives open to us is to give group members, create for them, or facilitate the establishment of some institutional process of community. What happened in the past is certainly relevant, as are the conditions that account for what happened. But beyond this there are a certain number of other intellectual tasks which we must perform. Foremost, we must clarify our goals. Are we simply partisans of contending groups in the Middle East, subordinating our own efforts to the continuation of a war system in the region? Or is our goal what we can see to be the common interests of all the inhabitants of the region: minimum order transforming itself into a regional system of human dignity? In light of projected goals, trends and their conditions acquire significance for the lawyer. Next, we ought to consider the probable consequences of different projected alternatives. Suppose we do consider one alternative, the Palestine Liberation Organization's self-determination position, which Professor Bassiouni quite candidly admitted to presenting. Suppose we continue the *status quo* as it is. What are the *consequences* of each of these available courses? Finally, what are the alternatives that we as international lawyers, committed to the common interest of all mankind, can propose that will better secure minimum order in that region and in the rest of the world and hopefully move us to a world order of human dignity—proposals that we put forward on the basis of our own survey and for which we take full responsibility.

I find unfeasible the proposals of certain arbitrary cut-off dates which will determine who can stay in the area of Palestine, after Professor Bassiouni dismantles the apparatus of the state of Israel and creates a secular state. Even if this could be accomplished, would it provide any degree of order within that region? I believe it would vouchsafe all the minimum order we see in Northern Ireland and in Cyprus.

Another alternative, which Professor Bassiouni touched on very lightly and I wish he had pressed further, is the possibility of returning to the United Nations Special Committee on Palestine's "Majority Plan" and trying to create within the former area of Palestine *two* communities, reflecting the strong national demands of two separate groups. In considering this, I would propose that we look at the *entire* area of Palestine. The agony of the Palestinian people did not begin in 1922 with the Order in Council which put into operation the Palestine Mandate in that region. It began in 1921 when Winston Churchill gave five thousand pounds a month to the Emir Abdullah and a small state to spend it on to stop Abdullah from waging war on the French in Syria. Abdullah was a Hashemite from Saudi Arabia; he was simply set on top of the Palestinians in that region. Since 1922 other decisions and changes were made without taking Palestinians into consideration.

The fact that these events were perpetrated in the past is in no sense a

justification for projecting this form of deprivation of free choice into the future. Insofar as the opportunity is open to us, and I believe it is at this moment, we should insist that some form of free expression and self-choice be offered to the Palestinian people. This operation should not be applied to the territorial area of Israel, for it would involve a comparable deprivation of the Israelis who themselves have their own historical trauma and have established a state for reasons which are well known.

In order to implement this plan or any plan expressing common interests, all participants must begin to change perspectives. Facile phrases put forward by Professor Bassiouni—Who is a Palestinian and who is an Israeli? What is an Israeli national and what is a Jewish national?—must be scrapped. They are symptomatic of one of the most bizarre symmetries in that entire area. If you study the Palestine Liberation Organization's stand and you study the most extreme Israeli stand, you find a strange parallelism: the Israelis insist that the Palestinians are not a national entity, but must be absorbed in the Jordanian state or in Israel; otherwise they are south Syrians or some other group. The Palestinians, for their part, say that the Israelis are simply Polish or Moroccan Jews but not Israelis. The genuine national aspirations of each of these groups must be recognized, and the specious notion of "cut-off dates" must be dropped. I am certain that Professor Bassiouni would not want to apply such dates to the Bantu in South Africa. I certainly would not want to.

What can this promise us in the Middle East? The Middle East is a very unstable region. We cannot bring peace there any more quickly than we can fashion it anywhere else in the world, for it is a part of the global war system. The tensions that are generated there will continue to maintain a war system until major structural changes are introduced. But we can begin to lower the level of overt violence. We can try to identify and treat some of the more obvious cankers of discontent. The Palestinian Arab problem is one; even if this problem could be solved, we could still expect tension among Arab elites. Yet, we do have a momentary opportunity to fashion some justice, to provide minimum order for both Israel and for the Palestinians; and possibly to begin to move that region toward a greater system of human dignity.

The CHAIRMAN then introduced Professor Ramazani.

### COMMENTS BY ROUHOLLAH K. RAMAZANI \*

Mr. Ambassador, distinguished members of the panel, Ladies and Gentlemen:

I would have very few words to spare. I am delighted to have heard Professor Reisman because he has indeed taken care of some of the remarks that I had in mind to make about the two papers. It would appear to me from the rather belated look which I have had at these two papers, that we really have had two different types of questions treated in both.

\* University of Virginia.

One, the matter of whether or not self-determination is a principle of international law and, the other, the question of its applicability to the Arab-Israeli situation today.

I would like to say that from the two papers I got the impression that, on the one hand, we have the assertion that this *is* a principle of international law and, on the other hand, that it is *not* a principle of international law or, perhaps, it is becoming a principle of international law.

If I may, I should like to try to look at this principle in the context of the international system, both in the past and continuing to the present time. I would doubt very seriously that we could categorically say (as it was implied in the paper by Professor Bassiouni) that a mandate system, for example, was a cloak for colonialism. When we look at the historical record more closely I think it would be fair to suggest that there was, on the one hand, traditional colonialism and the secret treaties of World War I—the attempts on the part of the French and the British to divide the Middle East areas in terms of spheres of influence. This was one element in the picture.

On the other hand, we had humanitarian, or moralistic—whichever way one would wish to label it—and sincere desire, on the part of some, to introduce the principle of self-determination, which eventually tempered the traditional type of colonialism to an extent and one would, perhaps, be able to say that the mandate system itself was a result of a reconciliation of the two; that is, self-determination on the one hand and unbridled traditional colonialism on the other; that there would be some exercise of influence on the part of the “international community” at the time on these Powers, at least rhetorically, at least in principle, although in fact, as you know, for example, from the British Mandate in Palestine, they were for all practical purposes left to their own devices. But it is not true to say that no notion resembling the principle of self-determination existed. Such a notion did exist in the sense that the mandate system was to aid the preparation of these people to the point that they would be able to stand on their own feet.

As we approach the period since the San Francisco Conference we come to a different kind of international system, in the sense that to a significant extent you might say that the principle of self-determination as a moral, not as a legal, principle has gained considerable influence in the international community. This has been referred to in the case of Palestine; that is, it has now been expressed in terms of a U.N. resolution. Again, here I would suggest that this is a new era, in terms of the “new states,” so to speak, which have come to the fore and expressed themselves not only in regard to the principle of self-determination but also a variety of other principles with which we are concerned as international lawyers. We all know, for example, their attitude in regard to *pacta sunt servanda*, and the doctrine of *rebus sic stantibus*. We know that the new states have somewhat different attitudes towards some of these principles. We are now, hopefully, on the verge of knowing more about these attitudes.



If we look at the picture in these terms, I am inclined to think that in this as in most other problems of international law we have the two principal questions of change and stability; the extent to which the principle of self-determination could be employed to bring about stability in the world community, not to destroy the existing stability, the extent to which the principle of self-determination could be invoked in order to bring reconciliation rather than a new pattern of conflict. So, if we look at the problem in these terms, I think we might perhaps explore some of the alternatives which were touched upon.

When we talk about self-determination, what do we really mean in the case of Palestine? What is the "self?" What do we have in mind? Do we have in mind the West Bank plus Gaza Strip? Do we have in mind the state of Israel today plus whatever else? What is it that we are talking about and under what circumstances would the application of this principle lead to greater conflict or greater conciliation?

Therefore I would suggest that we should look at this principle in terms of what is possible as well as desirable. I would like to conclude that my review of the principle of self-determination in terms of the changing international system would seem to suggest that it has been a principle of political adjustment as well as moral adjustment. I should therefore like in the course of discussion to go into some feasible and just alternatives in light of the principle of self-determination.

The CHAIRMAN. I should now like to give the two speakers a brief opportunity to respond, if they should wish to, to any of the remarks the commentators may have made and then to throw the meeting open to a general discussion or asking of questions from the floor addressed to any member of the panel.

First, however, I would like to avail myself of my privilege as Chairman to make two brief comments on the basis of my recent experience at the United Nations, and I must say that these comments follow very closely those which have just been made by Professor Ramazani.

First, as to self-determination, whether or not it is firmly embodied in international law and whatever part it may have played in the Charter of the United Nations, it has certainly become one of the most hallowed and widely supported principles at the United Nations. I think there is probably no single subject about which there have been more debate, more speeches, more resolutions adopted and adopted in almost every case by a sweeping majority. On the other hand, I think one should note, in addition to the fact Professor Green pointed out, that these resolutions are only recommendatory, that they are almost invariably limited to former colonial territories and that U.N. Members are on the whole extremely cautious about applying the principle of self-determination to the metropolitan territory of Member States, having in mind, of course, that if this principle should be sweepingly and indiscriminately applied there, it could easily effect the break-up of most of the Members.

The second point I would like to make is to invite your particular attention to the exact wording of the topic we are discussing. Whether or

not it was advisedly chosen, I think it was wisely chosen because it speaks not of self-determination and the Arab-Israeli conflict, but self-determination and settlement of the Arab-Israeli conflict. And I think this strikes a note Professor Ramazani just pointed out. Obviously this principle as applied in the area we are concerned with at the moment relates primarily to the Palestinians. I frankly think we shall not move toward a settlement if we concentrate our attention on the historical background, because we at the United Nations are familiar with the exhaustive and interminable arguments which can be made on either side to justify, on the basis of historical evidence, almost any solution. I think we have to deal with the situation as it now is, not necessarily the immediate *status quo* on the ground, but the basic situation in 1971 with a view to what may facilitate a settlement. Obviously, among the elements that have to be considered are the desires and interests of the inhabitants of Palestine. It is very difficult, of course, to determine them at the present time. We are not quite sure who speaks for them or when and how we shall be exactly able to determine them; but we also have to consider the other element—what part should their will, assuming a way can be found to express it correctly, play in the determination of a settlement? If, for example, it should make a settlement under present conditions wholly impossible, would the principle of self-determination nevertheless have to be upheld in its fullest degree or, if there should be a unanimous view of the governments concerned in regard to a particular settlement which some or all of the Palestinians did not consider accurately to reflect the principle of self-determination, would that view prevail in the general interest of maintaining peace in the area? I do not seek to answer those questions; I merely pose them. But I do emphasize the point which I think is made in the title of our subject.

Now I would like to ask if either of our speakers—Professor Bassiouni or Professor Green—has any comments which he wishes to make in regard to points which have been raised.

Professor BASSIOUNI. I shall just have a couple of brief comments. I think that we cannot ignore any cut-off date for the solution of any problem. The very fact that Professor Reisman and Ambassador Yost speak of 1970 or 1971 as a cut-off date is a choice, and I think that on the basis of this rationale one can advocate that 1947, 1923, or 1890 might be just as good a year. We are not arguing about the vintage of wine in determining which year is best. Obviously, the choice of a cut-off year is going to be very significant to the advocacy of either side. I would just like to propose that in terms of our discussion we should agree that there is a general principle of “self-determination.” There has been some question here that it is not; I certainly recognize that it is not a principle of customary international law, as evidenced by the practice of nations, for if that were the case, we would not have a problem of “self-determination” because nations would practice it. It is a general principle because it has been recognized as such by the nations and the peoples of the world. I would also like to emphasize that the United Nations Charter, as well

as international law, is ever evolving and, like a constitution, it develops pursuant to the pressures and needs of the times. Certainly these pressures and needs reached their apex with the recognition of this principle which is quite consonant with contemporary positions on human rights.

With respect to the issue of Palestine, if we are to speak in terms of a settlement of the Palestine question, but decide that the cut-off date is 1971, that is the end of the argument of "self-determination," because that means that self-determination of the Palestinian people would apply to the territory wherein they may be located at the chosen cut-off date. However, if we recognize the existence of the principle and we see its application as a right, we would have to inquire further as to when it arose and when it should have been applied. Should it have been applied in 1947 or in 1971? If we speak of its application in 1971, we have not forthrightly faced the problem because we cannot speak of the Palestinians' right of self-determination in 1971 in Jordan or in Egypt, as the right must link people to territory. That is why I have tried to make an argument for the need to find a rational nexus, a connection, or link, if you will, between people and territory at a given time. The cut-off date that I would choose, and I think it quite defensible, is the 1947 Partition Plan of the United Nations. The question that I have with respect to that plan is how the principle of "self-determination" was applied and in what manner it was applied; whether it was a valid criterion to use physical presence and conclude summarily that all those present on the basis of a head count would be entitled to this arbitrary division. Should there instead have been a nationality criterion? Even Professor Green pointed out the fact that there was a Palestine national entity; hence the nationality criterion is at least a valid starting point.

Concerning the future, I do not see the alternative of a separate Palestine state in either the West Bank or in the Gaza Strip, or, in other words, a Palestine state in Jordan or in Egypt. I can only see the development of a Palestine state in what was Palestine. If in the meantime, however, the original state of Palestine evolved in its political structure to become the state of Israel, the question becomes: How can we accommodate the claims of both people on the same territory? Can both peoples be accommodated on the same territory and could there be structures in that state which could be developed to allow the peaceful co-existing pursuit of the differing ideologies that these two collectivities represent? If that is the case, I would advance that self-determination has been accomplished. To be realistic, if this proposed solution takes place, these two collectivities will struggle with each other until they learn how to co-exist in a pluralistic society. This country is still struggling and learning how to manage its pluralistic society and such problems are not alien to any such society in the world. Such difficulties should not be an impediment for the reconstitution of a state wherein both collectivities are allowed equal rights.

Professor GREEN. Like you, Mr. Ambassador, I think one should bear in mind the title and one should also bear in mind the title within a legal framework. This is why it is so important to consider whether there is

or is not a legal right of self-determination. Broadly speaking, I would agree with the great idealism that is expressed by both the professors. I think it is very laudable and I do not think that anybody can quarrel with it. I also agree that it is one of the most hallowed principles of the United Nations and, like all the hallowed principles of the United Nations, tends to be completely disregarded. We are concerned about alternatives for the future. I agree it is a moral force; it is even more a political force. The alternatives may require, and I quote, "political and moral adjustment." I only wish that this political or moral adjustment were not applied quite so eclectically. It would be more encouraging.

I was fascinated by the reference to the backwards-flying bird. The left-wing professor has not only not flown backwards; he has soared right out of the realms of legal principle. He is concerned with political settlement. I am, too, but as a lawyer I am concerned with political settlement after the politicians tell me to frame the legal framework of that settlement. Until I am told to work out a legal framework for a political settlement, I remain a lawyer. If I am to act as a law-reformer, I may make proposals *de lege ferenda*. But if I make proposals *de lege ferenda*, I am not discussing self-determination and settlement of the Arab-Israeli conflict in the light of international law. I am discussing it in the light of a very subjective, extremely selective, ideological prospect for some time in never-never land. Quite honestly, I could not care less at this stage. We are concerned with a practical problem. The unfortunate issue is that it is political dynamite. It will have to be settled by the politicians. The lawyers may suggest how the framework will work, but until such time as the politicians have come forward with these alternatives, let us not pretend that lawyers that talk law are flying backwards. They at least have remembered what the rôle of a lawyer is.

Professor REISMAN. It is quite obvious that Professor Green and I entertain entirely different notions of what the rôle of the lawyer is and more generally what the function of international law is in securing international peace. I believe that the rôle of the international lawyer is to clarify common interests shared by all members of the many communities of the globe and to innovate institutional and instrumental procedures for realizing those interests. Hence, my focus is not what has been done in the near or distant past, but what can and should be done in the future.

The CHAIRMAN. Ladies and gentlemen, I think that now we might move to questions from the floor. I would appreciate it if any of you who wishes to ask a question would stand and identify himself and would preferably address the question to a particular member of the panel.

Mr. REUBEN EFRON. My question is addressed to Professor Bassiouni. He spoke about the Palestinian entity and Palestine as it existed under the British Mandate. At that time, was not Jordan also an integral part of Palestine? For that reason, within the framework in which you are discussing the settlement of the Arab-Israeli conflict and the necessity to establish a Palestinian entity, why could not such an entity be established on the territory of Jordan plus the areas now under Israel's occupation?

Professor BASSIOUNI. The best way I can answer your question is that

I would have to look at Palestine as it was defined under the Mandate. This may be arbitrary and I suppose that you can say that we can go on and find any other cut-off date that would be more satisfactory to you. Palestine is adequately described in the Mandate and that is what I refer to.

Dr. BURHAN HAMMAD, Deputy Permanent Observer of the League of Arab States to the United Nations. I was also amused by the story of the bird that flies backwards. Accordingly, it seems that the bird cannot fly backwards from 1971 to 1947 or 1948, but it is easy for that same bird to fly backwards four thousand years. The establishment of Israel has been predicated on the flight backwards into history, to a period of four thousand years ago, at which time a state called Israel was in existence. The Zionists' main claim for the establishment of Israel today is that it is imperative to reconstitute a state that existed four thousand years ago. It appears, accordingly, that it is easy, for reasons of expediency, to fly the bird backward four thousand years, but not twenty years or a little more, to restore the rights of the Palestinian Arabs.

Second, I agree with Professor Reisman with regard to the rôle of the international lawyer, and I disagree completely, therefore, with Professor Green's point of view.

Professor Green spoke of the non-existence of the right of self-determination in what he called classical international law. I again disagree with him on that point. Yet, if I concede it to him for the sake of argument, he should not forget that the creation of classical international law was the outcome of Western European thought and civilization. In such creation, it aimed at the perpetuation of Western colonial rule in both Asia and Africa by denying the peoples of these two continents the right to independence and sovereignty.

I agree with you, Ambassador Yost, that the right of self-determination is now the most hailed principle in law, in international law, and, at least, at the United Nations. The reiteration of this principle, both in resolutions and utterances, at the United Nations has conveyed authority on it and made it part of international law. This process of lawmaking is equivalent to the same process in national law. Decisions of the Supreme Courts as well as utterances of authoritative officials do become prescriptions of such states where decisions and utterances have been made. As Ambassador Yost said, the right of self-determination is one of the most extended areas where decisions have been made at the United Nations. This in itself, accordingly, has made the principle part of international law.

If Professor Green denies the applicability of the right of self-determination to the Palestinian people, on what basis would he conceive the establishment of the state of Israel? He knows, as well as I do, that Israel was established on the basis of the doctrine of Zionism. The interpretation given to Zionism by its adherents emphasizes the right of Jews to determine their future and to establish a state in Palestine. If Professor Green denies this right to the Palestinians, would he also deny it to the Jews, to the Zionists, and, accordingly, negate the very basis on which Israel was founded? If he does not deny this, on what basis, then, would he justify the establishment of Israel?

Professor GREEN. Briefly, I never realized that even the Western concepts of international law in the classical sense were the product of the mid-nineteenth century grab for Africa and colonies. I understood that Grotius, Baccaria and Vitoria lived many centuries before that period. I also understand that writers like Kautilya in Asia and the Chinese classicists also wrote on international law and also did not recognize a right of self-determination and I am not sure that they always knew where the white colonies of Africa were. I have never suggested that the state of Israel was based on self-determination. I do not believe that any state is based on self-determination and I do not believe that there is a right of self-determination. The state of Israel was born, as so many other states have been born, by the recognition of the existing states of the world, no more difficult, no more simple, than that.

Dr. FRANK C. SAKRAN. I want to thank Professor Green for disabusing my mind about the doctrine of self-determination. I had been brainwashed by President Wilson's speeches and declarations, President Roosevelt, Mr. Churchill, and even by Presidents Johnson and Nixon, who say we are in Viet-Nam to uphold the right of self-determination. I also recall that last year the United Nations adopted a resolution specifically stating that the Palestinians have the right to self-determination under the Charter.

However, if the Palestinians have no right to self-determination, how about civil rights? I recall two documents which uphold their civil rights. One is the Balfour Declaration, another is the League of Nations Mandate to the British Government, both of which provided that nothing should be done which might prejudice their rights. I also remember the many resolutions of the United Nations which say that the Palestinians who were expelled or who left their homes during the 1948 war have a right to repatriation. It has been the failure to implement that right which created an "irredenta" and the state of war which has existed since 1948. These refugees have been demanding the right to return to their homes. I wonder if Professor Green would also deny them, or any other people, the right to live in one's own home and country.

Professor GREEN. Sir, I am fascinated by the long list of eminent international lawyers, starting with a professor of Constitutional history and finishing with a Texan farmer. I know that perhaps the Mandate has been interpreted in a multitude of ways. Again, one can start with the Churchill White Paper of 1922, the severance of Trans-Jordan from the Mandate, and finish with the British White Paper of 1939 when, you may recall, the League's Mandate Commission said: "Well, we're not sure it is contrary to the Mandate, but at least it is a new interpretation of the Mandate."

But even with regard to this long list of General Assembly resolutions, it is fascinating to watch the eclectic way in which resolutions are chosen. Those of the multitudinous General Assembly, disregarding abstentions, some of which are honest and some of which are dishonest; disregarding votes which are cast for purely political reasons, because you cannot remain sitting on the fence; but also disregarding such resolutions as the

Security Council's resolution on the right of navigation through the Suez Canal—we can play this game both ways. I do not think it achieves anything. I am concerned not with whether the people should be allowed to live where they want to; there are many people, including, shall we say, the Asians in Africa, who would like to live where they want to. But I am concerned with whether there is a legal right of self-determination as such. That's all. That's all I was asked to talk about.

Ambassador YOST. I would like to point out again that I do feel that we are discussing more than whether or not there is a legal right of self-determination. We are discussing its relationship—whether it is a right or a principle or a theory—to a settlement of the Arab-Israeli conflict. Perhaps we might give Professor Green a rest; does someone have a question for someone else?

Professor MELVINA CUGGENHEIM. My question is addressed to Professor Bassiouni. In 1922 (I think that is the date you chose for a head-count) in what way would you say, under your definition of nationality, that the Arab living on the West Bank of the Jordan was of a different nationality than the Arab living on the East Bank of the Jordan and, if he was of a different nationality, why was it that at the time of the Partition Plan of the United Nations the territory set aside for a separate Arab Palestinian state was absorbed by Jordan rather than being made a separate Arab Palestinian state?

Professor BASSIOUNI. The cut-off date chosen, of course, was the establishment of the Mandate. It also has relevance to the fact that a nationality entity was established in Palestine, for which passports were issued, a flag was designed and hoisted, and a variety of other paraphernalia of nationality that were devised to accomplish that objective. I think that if you are going to establish a principle of self-determination and seek to apply it to a particular process, that is, the process of asking the people involved in that collectivity to make a political determination of their future, you must establish some criteria as to who are those who qualify for being part of that group called "people"—from whom it is requested to make such a determination. The best criterion I have to offer under existing international law is nationality, and those who constitute the nationality entity are the people, *i.e.*, the Palestinians at the time that such entity existed. The right of "self-determination" would then be limited to those who are Palestinian nationals and should not be abridged, either by illegal immigration or an indiscriminate head-count that would include people who are non-Palestinians and who are allowed by their mere presence to determine the outcome of a solution that runs counter to the choice of a majority of the nationals.

Dr. YOUNIS ALAZZAWI. I would like to submit a brief comment and question. I think we are discussing the insignificant part of the problem, and that is whether there is or is not a right of self-determination under international law, and we have left the significant part of the issue, whether or not there could be a feasible settlement of the Middle East problem or of the Arab-Israeli conflict. Whether we agree or not that there is a

right of self-determination under international law, that is not going to solve the problem which we are undertaking.

I was wondering if the Chairman, the members of the Panel, and the audience would focus their attention on the settlement question, what we can see, what we can do, as lawyers in regard to this problem. Can we propose some practical solutions to achieve a feasible settlement of the Arab-Israeli conflict? I would like to see this taken up by the panelists and by the floor, rather than to deal with the formal question whether there is or is not a right of self-determination under international law. That is not going to solve the problem; let us get down to business and waste no more time.

Chairman Yost. I might make a comment on that comment. It is, of course, true that the subject we are discussing is far from comprising the whole of the problem. The outlines of a settlement which have been approved by the U.N. Security Council—the famous resolution of November, 1967—embrace a much wider scope than what we are discussing, because they concern the ending of the state of belligerency and the recognition of the territorial integrity and sovereignty of all the states in the area; certain guarantees, procedures, which might reinforce the protection of those states; free transit through international waterways; and the rights of refugees. So, in a sense, we are discussing only a fragment of the problem, but perhaps, once again, the authors of our agenda were wise to confine us to that element, because if we endeavored here to discuss all of the elements of the settlement, we would be at it, I am sure, all night. I think we should probably try to concentrate primarily on the relevance of the issue of self-determination as an integral element or factor in the settlement. It can be a condition of the settlement in the minds of some, as applied to the Palestinians; it can be in others an obstacle to a settlement; but, in any case, it certainly is one of the basic factors and we all recognize that. Let us, I would hope, try to concentrate on looking on the application of the principle of self-determination to this conflict in such a way, as Professor Ramazani indicated, to facilitate reconciliation and settlement rather than deepen differences and hostility and block a settlement.

Mr. WALTER S. JONES. I hope that my question follows logically from the preceding and that it comports with the Chairman's remarks. I should like to address myself principally to Professor Reisman.

Because I have felt strongly for some time that the practical application of international law is best understood in light of doctrine and comparative theory, I should like to make some practical use of this conflict which we have had today between the "*lex lata*-bird" and the "*lex ferenda*-gator."

If I understand Professor Reisman correctly in his remarks about the establishment of a rule of law in the Middle East based upon a world order of human dignity, or minimum public order based on human dignity, then I assume, in the absence of a closer definition of that expression, that he is speaking in terms of Professor Lasswell's values, the eight cardinal values of power, well-being, affection, etc. I wonder if Professor Reisman



would care to comment on whether or not my assumption is correct, to begin with; and if it is, if he would care to take those values, or some of them, one by one, and to define and describe for us some manner in which a public order of human dignity for the Middle East might be established around those values and around self-determination.

Professor REISMAN. I have written a book on diplomatic alternatives which might secure more minimum order and human dignity in the Middle East. I treat in great detail all these issues. You might want to consult it. Though the situation can be improved, I am, nonetheless, skeptical of the possibilities of achieving peace there. The challenge we face in the Middle East and the opportunity that we have in this rapidly eroding moment of the present is to make changes in a number of sectors so that, if we do not achieve peace now, we do, at least, lower the level of overt violence and begin to structure things so that the participants themselves can begin to move toward a more viable world order.

Dr. PAUL RIEBENFELD. I just spent two years in Geneva researching the Palestine Mandate in the archives of the League of Nations. Still, I will refrain from history except to remind you, since we are speaking of self-determination, of Rudolf Stammler's thought that there is in international law something like a higher norm which from time to time, in accordance with changing values, dominates the historical and legal process. For instance, during the last ten years the concept of "decolonialization" can be said to have represented such a higher norm. Now, with reference to the Palestine Mandate, it must be remembered that it was "self-determination" which pervaded the work of the League of Nations since Wilson. And I would say, as stated by President Truman in his memoirs, and by others, that it was the idea of self-determination that induced President Wilson to support Zionism. It seemed only just that the Jewish people, too, should be enabled to restore its independent national existence, and to do so in its ancient homeland which, under Arab and Turkish rule, had simply been the southern part of Syria, without distinct identity. It was the idea of self-determination which finally resulted in one Jewish state and, so far, fourteen Arab states being represented in the United Nations.

But I wish to address myself to the present situation, and here also I should like to start with some facts. The last Jordanian census taken in November, 1961, showed a total population of 1,640,039 citizens, of whom 1,355,450 were described as of Palestinian origin. Of these, 805,450 lived in Cisjordan, the West Bank, while 550,000 lived in Transjordan. The number of citizens of Transjordan birth was 284,589, and there were also, on the census day, 53,000 Nomads in the country. The Palestinian Arabs represented approximately 83 percent of the total settled population of Jordan.

Now I cannot imagine that even Professor Bassiouni, in advocating his proposed solution, has in mind that King Hussein would send more than three quarters of the population of Jordan out of the country and that he, or for that matter the U.S. Government, would want to see a Jordanian

state of about 350,000 people. Is it not true that the advocacy of the Palestinian cause as formulated is aimed at maintaining the thrust against Israel, which would be lost if the reality were faced that the Palestinians have a country of their own in which to exercise self-determination?

And furthermore, Jordan is not a foreign country. This brings me to another fact which seems badly misunderstood. It is not true that with the occupation of the West Bank in 1967 the Israelis occupied the whole of the Mandate territory of Palestine, for Transjordan, too, was a part of Palestine, in history as well as under the Mandate. And it was part of Palestine, not until 1922, as is so often stated, but until May, 1946, when the British made it independent, nine months before they submitted the rump mandate to the United Nations for adjudication.

All that happened in 1922 was the suspension under Article 25 of the Jewish National Home provisions "in the territories lying between the Jordan and the eastern boundary of Palestine" and the institution of a local Arab administration in what the relevant files of the League of Nations describes as "the transjordanian province of Palestine." As King Abdullah wrote in his memoirs: "In 1922 we were separated from the Balfour Declaration." But this did not mean being separated from Palestine as far as the Palestinian Arabs were concerned. Unlike the situation regarding Syria and Lebanon, which were constituted as two separate mandate territories, Transjordan remained under the Palestine Mandate and was administered under the authority of the High Commissioner in Jerusalem. Transjordanians traveled on Palestine passports and Palestinian was their nationality under international law. No obstacle prevented free movement of Arabs between Cis- and Transjordan, and many Transjordanians either seasonally or permanently settled and worked in places like Haifa, Jaffa, or Jerusalem. The exclusion of Zionist colonization and the delegation of certain administrative powers to the Amir Abdullah had among its effects not that of separating Transjordan from Palestine, but that of securing its Arab character, its Palestinian Arab character, if you wish. It was on the unity of the country on both sides of the Jordan that King Abdullah later based the annexation of the West Bank.

Looking at these facts, can it really be suggested that the Palestinians who are today in Jordan are the guests of a separate host nation which consists of Transjordanians; that the Palestinians are no more at home in Jordan than they are, for instance, in Egypt or Lebanon? Last November *Le Monde* carried a speech by Yassir Arafat in which he said that the Palestinians consider both sides of the Jordan as their country, that those who would accept the establishment of a Palestinian state on the West Bank territory only were "the running dogs of the counter-revolution," and that the Palestinians would not cede their claim to Transjordan as part of Palestine.

Regarding that proposal of a West Bank state for the Palestinians I myself cannot understand anybody with a sense of realism and a feeling for political atmosphere advocating such a step. For any foe of Israel the resulting map would certainly provide a potent visual aid for the purpose

of anti-Zionist propaganda. There would be that long strip of Israel, eighty percent of Cisjordan, occupied by the Jews, and there would be shown this tiny bit of insert, twenty percent of Cisjordan, left to the Palestinians. The truth, however is that even today, with the West Bank in Israeli possession, eighty percent of the area of Palestine belongs to and is occupied by the Arabs of Palestine. This truth has to be made visible in any settlement if the unjust myth is to disappear that the Palestinians have been robbed of their country and driven into foreign host countries.

Being the great majority in Jordan, and talking of self-determination and democratic principles to be introduced in the future, what is it that stands in the way of affirming the Palestinian character of Jordan, of the Palestinians voting themselves into power? We, as Americans, have an interest that this should be done in an orderly way, under a responsible leadership, and that King Hussein, being really the King of the Palestinians, and of eighty percent of Palestine, should face the needs of reality. Instead of being one of the causes of continuing strife, he should work toward a peaceful solution between Israel and Jordan which should also embrace the issue of Palestinian self-determination. Here is a task for statesmanship and one which international law can help to clarify.

Professor BASSIOUNI. I attempted to formulate some guidelines for what the word "people" means, and to find a connection between people and territory, in an attempt to define the existence of a necessary link between a given people and a given territory on which they can exercise this right of self-determination.

I can see three different stages that have developed in the post-1947 period: Stage one is 1948 to 1966, where the United Nations looked upon the Palestinians merely as refugees. That started with Resolution 194 (1948), wherein the refugees were given a right to return in peace to their territory which had been allotted to the state of Israel. It remained that way until 1969. Even in 1967 after that war, Resolution 242, paragraph 2, stated: "affirms further the necessity of achieving a just settlement of the refugee problem." Until 1967 the Palestinian people rated just one line in that resolution and that one line still referred to them as refugees. Stage two started in 1969, when the United Nations General Assembly recognized that we are now dealing with a "people" and recognized for the first time that they are the primary parties to the conflict. I might emphasize that they are the central issue of the conflict, not the surrounding Arab states which also have a different conflict with Israel. Theirs is a territorial war predicated on an ideological conflict. That was finally recognized in 1969. Stage three was in 1970 when the United Nations, based on the recognition of stage two, stated: "recognizing the inalienable rights of the Palestinian people, further affirms that no peaceful solution can be made other than on the basis of self-determination."

Now that we have determined that there is a people called the Palestinian people, we must define their territory and the link that must exist between the people and that territory. We cannot ignore, however, the conflict between that people and another people called Israelis concern-

ing that identical territory. Can we proffer some equitable formula to balance the rights of those two collectivities on that same territory? There are several ways to consider the question. One approach was the United Nations in 1947, to make an arbitrary division of the land, a sort of a Solomonian justice that, if you cannot determine the mother of the baby, split the baby in two; thus allotting part of Palestine to the prospective Jewish state and part of it to the prospective Palestinian state. Another approach is to find for the Palestinian people an entity—a state other than Palestine so that there is no more question about their claims to statehood. So we alternate between such proposals as trust territories, as Professor Reisman suggested; a binational commonwealth, as Professor Cottlieb suggested; the establishment of a separate Palestine state on the West Bank; or, as Dr. Riebenfeld suggested, the transformation of Jordan into a Palestinian state. Well, that is all fine and well, but to some extent I feel also bound by the limitations of my discipline, which is the legal discipline, and I have to find some legal framework. As such, I must conclude that: If we have a defined people and we have a defined territory and recognize the existence of an established right, then should not that established right be applicable to those people on that territory? And that is why I propose that we might look at Palestine at the time it was Palestine, prior to its demographic transformation which was imposed from the outside.

Dr. RIEBENFELD. Certainly you will not deny that at that time, before and until 1922, Trans-Jordan was part of Palestine. No one has ever denied this fact.

Professor BASSIOUNI. The point I am trying to make is that if we choose the territory as it was constituted as a national entity, the people as constituted and part of that entity, this would be the framework within which I would operate. The only caveat I would add is whether or not there is a possibility of developing within Israel those social, economic, and political structures that would allow for the peaceful co-existence of the two collectivities, to pursue their divergent ideologies. I can see no better way for accomplishing that than by the establishment of a secular, democratic state where both collectivities would be afforded constitutional rights as in any other pluralistic society.

Professor RICHARD ARENS. I am quite willing to view the concept of self-determination in a broadly political, as well as a legal, context. What concerns me about self-determination is the specific meaning one attaches to it. Self-determination to Sudeten Germans meant death to Czechoslovakia. I am concerned about how this particular concept will be applied by spokesmen of the Palestinian Arabs, notably Yassir Arafat, whom I have listened to and believed, and who is a proponent of genocidal warfare. Professor Bassiouni suggested changes in the internal structure of Israel to accommodate the Arabs. What assurances do we have, in the light of Arab belligerent practices, both within Palestine and Israel, into which incursions involving attacks on the civilian populations were made in great numbers, and in the light of the recent Egyptian ventures into

the Sudan, where mustard gas was employed against native inhabitants, that the rule of law of the civilized world community will in fact be upheld?

Professor BASSIOUNI. Forgive me for saying so, but it seems quite speculative and rather spurious to try to look at the practices of Egypt in the Sudan or even in Egypt and to reach conclusions as to what would be the practices of the Palestinians as a minority group in Israel. Israel now has close to three million people. I assume that those Palestinians who would elect to return would be no more than a million and a half Palestinians. Hence, the organs of political control would still remain for many generations to come within the hands of Israelis. The idea that the Palestinians would develop into a fifth column has proven not to be true. Since 1967, as Israel has occupied Arab territories, these great fears have not materialized and been proven to be largely unfounded. I am sure that we can all read statements made by any revolutionary group, whether in the Arabian peninsula, in Africa, or even in the United States with some reservations. If you listen to pronouncements made in this country by some revolutionary groups you would be equally appalled. I do not think we should look at such statements as an impediment to any proposed peaceful settlement plan.

I would rather ignore your point of who did what, when and to whom, although I feel on very secure grounds arguing it and concluding that Israel was the original aggressor, and what, if any, would be the ensuing rights of self-defense of the Palestinians, who were excluded from their original homelands. The reason I propose to ignore the question is in order to try to avoid all of those issues which would not lead us to any peaceful resolution. I would, therefore, propose to say that: There is a collectivity called the Palestinian people who claim they wish to return to what was once Palestine; there is also a group of people called Israelis who are now in what was called Palestine and who have developed a new political structure therein; hence we have two collectivities seeking to share the same territory, and the question is: Does one or the other have a superior right to be there to the exclusion of the other? We can even avoid answering that question in the spirit of conciliation and conclude by saying that the Palestinians have a right not to be excluded from that new structure. Certainly, the United Nations has made that point quite clear in its many resolutions, and, since this is the case, why should we not apply the principle of self-determination and allow the Palestinians to be included in that which was their homeland, subject to the political transformation which took place, but by guaranteeing them the protection of their human rights. As a matter of fact, I would be much more fearful for the violations of the Palestinians' human rights under Israeli occupation than I would for the majority of the Israelis who would be in control of the organs of power if the Palestinians were allowed to return.

Chairman YOST. I might make one or two comments about this latest discussion in the light of what I would call the prevailing sentiment at the United Nations, and perhaps some of my former colleagues there

whom I see here would wish to correct me, but in regard to the right of self-determination of the Palestinians, my feeling is that there is a growing feeling that some way should be found in whatever settlement of the Arab-Israeli conflict emerges so that the desires and interests of the Palestinian people shall be taken into account in as just a manner as possible.

Second, there are, of course, the old resolutions of the United Nations giving refugees the right of free choice to return, and these resolutions are still in force, and it is assumed that in any settlement some way would be found of seeking the views of individual refugees as to their preferences. But again the feeling is, and I may say that many Arabs maintain this very strongly, that a relatively small proportion of the Palestinian Arabs would in fact choose to return to Israel under present conditions if there is any sort of sort of decent, viable alternative offered. This may or may not be correct, but this is a very widely held judgment.

The third point in regard to self-determination for the Palestinians, the one that I emphasized earlier, is that I think there is a rather strong and general feeling that, important as the right of self-determination of the Palestinians and, indeed, of all peoples in the area is concerned, this should not be allowed to be indefinitely a bar to a peaceful settlement. It is a very important element in a settlement, but it should not be considered as the only factor that should be taken into account. The interests of all the other Arab peoples in the area and the interests of the people of Israel also must be taken into account, and these must all be weighed over and against each other.

Professor W. T. MALLISON. My question is directed to Professor Bassiouni and this is the general question: What is the rôle of sanctions and enforcement of our existing world community prescriptions in achieving the minimum order system which Professor Reisman has very appropriately recommended? It seems to me that Professor Reisman's generalizations are quite desirable but they do not take us very far down the road in terms of concrete solutions. What can we do to make a start toward achieving minimum order? How about the existing world community prescriptions? How about Security Council Resolution 242, including, *inter alia*, withdrawal from the occupied territories? After the 1956 attack there was withdrawal because the United States and the world community enforced it. How about the Security Council resolutions on the other side dealing with free passage through the Suez Canal? To fly backward a little bit further, I would like to make brief mention of the claims to legal title of the state of Israel, stated in the Declaration of the Establishment of the State of Israel (1948) to be (1) the Balfour Declaration, which became international law through its incorporation in the League of Nations Palestine Mandate, and (2) the General Assembly Palestine Partition Resolution (1947). Governmental powers are exercised under these legal instruments. Are there any legal limitations on the state of Israel from these same juridical authorities? The Balfour Declaration, in the first safeguard clause, protects the basic rights of the Palestinians. The Pales-

tine Partition Resolution, in an equal protection clause taken from our own Fourteenth Amendment, provided for equal protection and non-discrimination on religious grounds in both the state of Israel which was established and the Arab state which was not. In your view, Professor Bassiouni, would it be a start toward minimum order if we enforced and took seriously our existing world community doctrines?

Professor BASSIOUNI. Let me first start by saying that you yourself, Professor Mallison, in two most authoritative articles, have explored these questions and have certainly stated them with much more clarity than I could in the brief few minutes that I have to answer. I do not encounter any difficulty in answering your question but rather in the implications of the question. For example, if I were to say "by all means" we would have to start by establishing minimum world order by the enforcement of international law through such documents as the Balfour Declaration, the Partition Plan, Resolution 194, the subsequent resolutions, etc., there is no doubt that nobody would disagree with that. The question becomes: "What machinery of enforcement can we develop."

But the implication of the question, of course, takes us far beyond that, because the implication would naturally lead us to question the Partition Plan and question the assumption upon which the Partition Plan was made. And if it was made on the assumption that there is some modicum of application of self-determination based upon a head-count, can we then challenge the validity of that assumption? Can we challenge the validity of the Balfour Declaration and its significance in international law and whether or not it does have any significance and what was its purpose in being incorporated in the Mandate system, for example? All of that would lead us, in effect, to challenge very effectively, at least from the viewpoint of advocacy, the existence of the state of Israel itself. Now, I am fearful in saying that, although a case can be made to challenge the existence of the state of Israel, the human rights of the Israelis should be equally preserved. The implementation of the rights of the Palestinians to return is a clear necessity and finds its foundation in international law. The following question would be, once we had attained this right of return or maybe, in other words, if we were to attain this right of return, what then? And I think it is very legitimate to call for the subsequent question: What would happen if tomorrow the Palestinians would be allowed to return? This is why I am saying that maybe the best way we can explore the matter is via the question of self-determination. Theoretically, I would pose the question in those terms: There is a collectivity called the citizens of the state of Israel and I would recognize the existence of that collectivity. I would cut that collectivity off from the very nebulous concept of the Jewish people that you have treated so effectively and may recognize the Israelis as a nationality entity. I would then take the Palestinian people and recognize them as a nationality entity. I would then try to place them in the context of that territory which they both claim, and I would then find out what are the basic, minimum human

rights that would be applicable to two collectivities living within a given state structure. I would say that, once this has been attained, we have not only accomplished the Palestinians' right of self-determination, but the Israelis' right of self-determination as well and we have finalized the existence of a state within the Arab world region composed of a pluralistic society.

The question then becomes, How do you develop those social, economic, and political structures which eliminate any basis of discrimination between Arabs and non-Arabs to achieve the peaceful, co-existing pursuit of the goals of the two collectivities in that structure?

Professor RAMAZANI. Mr. Chairman, ladies and gentlemen, my mind again tends to peaceful settlement and to what is politically feasible as well as morally desirable. From what I gathered from the two papers at the outset, there seems to be some kind of a dichotomy in terms of the principle on the one hand, and assertion of its existence on the other. I gained the impression that what Professor Bassiouni has in mind in talking about a pluralistic society would really, in the last analysis, amount to something very similar to the P.L.O. proposal. I could be corrected if I am wrong. And if this is so, I should like to ask under what circumstances can we really envisage such a solution? This would really, for all practical purposes, mean that the Jewish population would be reduced to a minority in a state dominated by the Palestinian Arabs. For that reason again, that application of the principle of self-determination, no matter how laudable, would seem not to be in the cards.

There are other alternatives in terms of the West Bank and of Gaza, in terms of including not only the West Bank and Gaza but also perhaps Jordan, and these again are also various kinds of alternatives that as academicians we can talk about and think about. My mind tends to what is in fact going on at the present time. No matter how much we talk about "collectivities" (and I would not deny that there is such a thing as a Palestinian consciousness and that there is such a thing maybe—I should say should be—on the conscience of mankind about the Palestinian people), the parties to the conflict at the moment are the Arab states on the one hand, and the state of Israel, on the other. Given this, it would appear to me that the minimum that could be done—not to stop at that minimum necessarily—would be to consider the principle of self-determination in search of a settlement in the sense that it would be recognized in these negotiations that there is a Palestinian collectivity and that no eventual solution could prove viable without taking into account the existence of this fact.

Mr. MICHAEL PERSICO. Addressing myself to the topic "Self-determination and the Settlement of the Arab-Israeli Conflict," this brings to mind a question in light of what has been said so far. The gentlemen have been using the word "Palestinian" and "Arab" synonymously and in many cases this use would be valid. And if we were to assume at this point that there is a principle of self-determination and, to go even a step further, say



that this principle was granted to the Palestinians and that an accord could be worked out between the Palestinians and the Israelis, would this bring to a termination the hostilities in the Middle East? I do not think so. If we draw a distinction between the Palestinians and the Arabs at large, are the interests of the Arabs, for example, Egypt and Syria, synonymous with and one and the same with the Palestinians' interests vis-à-vis the state of Israel? Once again, I think not. I think that the Palestinians have been used, in a sense, as an international scapegoat in the Arab-Israeli situation and that while actually the Palestinian problem is a very real one, it is only a very small part of the total picture, which is that there are definite clashes of interests existing between the states of Syria, Jordan, and Egypt which will not be resolved by means of the settlement of the Palestinian question. I think that if one goes to this area today, one sees evidence of this fact in that the Palestinians who are *not* within the state of Israel are being retained in camps by the Egyptians or the Syrians or the Jordanians and that, at least if not in word then in action, the Egyptian, Syrian and Jordanian governments are trying to prevent assimilation of the Palestinians into their societies so as to prolong the Palestinian problem to further their own interests.

So my question generally to the Panel, and anyone can answer it, is: Do you really believe that you can separate or blame the conflict on the Palestinian problem and do you feel that the resolution of the Palestinian problem will resolve the Middle East conflict?

PROFESSOR GREEN. May I answer this, because I think that to some extent comments made by both Professor Bassiouni and myself have been overlooked. Professor Bassiouni in one of his recent remarks drew attention to the fact that we may in fact be faced with two distinct problems: one as between the Israelis and the Palestinians or, to put it the other way, the former inhabitants of Palestine and, on the other hand, a territorial problem between Israel and certain states. I some hour or more ago said that the issue is one of Israel and the citizens, not Arab lands nor an Arab people. We were very clear, both of us, that there are two distinct problems and I thought it was rather fortunate that we avoided this problem of who was using whom for what, and that we have avoided the political polemics and the subjective—I do not want to say analysis, but name-calling—that we could have started off with right at the beginning. One of the tragedies of Palestine, and I use the word in the original sense, whether it was in the days of the Mandate or whether it is now in the context of the Middle East, is that the partisans on both sides have an unfortunate habit, as have the Americans in Viet-Nam, for that matter, of imagining that you can take the territory out of its area, put it in a matchbox, and wrap it up in cotton wool, and now say “we will talk about it,” forgetting that it is part and parcel of a regional problem, that the regional problem is part of a major political problem, which is in itself part of a world problem. And from that point of view, self-determination for the man in the moon, and he may very well want it in a few years,

will not solve the problem of lunar exploration, nor will the problem of self-determination for Arab refugees, for Palestinians, however extensively or narrowly we interpret the term, solve the problem of oil in the Middle East and power conflicts in the Levantine crescent.

Professor REISMAN. I do not think anyone on the Panel assumes that somehow resolving the Palestinian problem would resolve the general conflicts in the Middle East and bring peace to that tragic area. On the other hand, I demur to what you and perhaps Professor Green implied: that resolving this particular problem will not do anything. We deal not with a single problem, as you point out, but a complex of problems. But we have to deal with them singly. Each requires a different policy analysis, for each comes from a different context; each one of them may require a different strategy and timetable for solution. I do think that resolving the Palestinian refugee problem would contribute to order in the Middle East.

Professor BASSIOUNI. Allow me first to make some preliminary remarks. The Palestinians are not in a position to make war, as a state is, meaning Egypt or maybe Jordan, but they are in a position to prevent peace. I am thoroughly convinced, even though I may be accused of fantasy, that the central issue in what is called the Arab-Israeli conflict, is the Palestinian conflict. I think that once you have resolved the Palestinian conflict, many of the other secondary issues will be resolved. I do not think you will see a conflict over right of passage through the Suez Canal or the Gulf of Aqaba, for example. I do not think you will find a problem any more on secure boundaries, once you have the Palestinians living within a pluralistic society in Israel-Palestine. Now this does not mean that you will not have certain trying times before Israel-Palestine, or whatever you will call the combined state, ultimately finds a way to assimilate itself into the Arab world. This will be as difficult as other countries have found it difficult to assimilate into a regional grouping. Certainly there is an ideological confrontation that is going on between the concept of Zionism, in the broader scope of the word in terms of the ingathering of all the Jewish people of the world, *versus* the concept of Pan-Arabism, which is a regional concept concerned with the development in the future of either greater Arab co-operation or the establishment of an Arab nation. As time goes by, I think you will readily see that the concept of Zionism as it was perceived in the 1920's is going to change with the demographic change in Israel—more people born locally, more Arab Jews, Sephardic Jews, more Palestinians—you will see a national identity emerge in Israel which will be more linked to the Arab world than it will be linked to the abstract notion of world Jewry that Zionism developed for many years. This will ultimately bring about a greater element of assimilation of that state in the region itself. So that certainly that which will set in motion this gradual transformation of the area ultimately leading to peace has to be the resolution of the legitimate claims of the Palestinian people. Thereafter, I feel that all of the rest

will fall into place. Having resolved that issue, at first there is not going to be the sort of cordial co-operation which may exist between the United States and Canada, but certainly there will not be a situation likely to threaten world public order by military confrontations.

Now, Sir, why are not these events set in motion which would ultimately preserve world order? The answer is your very question: World community prescriptions are simply ignored by Israel and in the absence of international enforcement machinery Israel can continue with impunity to disregard the blueprint for peace which the United Nations offers. Consider if you will that: (1) the United Nations ordered in 1948 the return of the Palestinians, and Israel not only failed to do so but refused; (2) the United Nations ordered in Resolution 242, November, 1967, the withdrawal of Israel from occupied territories, but again Israel rejected the notion; (3) the United Nations condemned and admonished Israel with respect to its annexation of Jerusalem (Res. 2253 and 2254, July, 1967, and Res. 2452, December, 1968), but Israel flaunted this resolution too, even though it was voted by one hundred nations.

The defiant violations of Israel have, for whatever rationalization it may advance, left the world community with two alternatives and the other parties to the conflict with no other options than resort to self-help. The conclusion is, therefore, that Israel's disregard of world community prescriptions in the absence of international enforcement is bound to result in violent confrontations. Thus, Israel's present posture vis-à-vis the world community is a threat to world order.

Chairman Yost. Just one concluding comment. One of the questioners raised the matter of the enforcement of decisions of the international community and this, of course, is of immense concern to the United Nations. The Secretary General has recently been arguing that the next step in the evolution of the United Nations should be general acceptance of Security Council resolutions which are adopted unanimously, and, of course, he had in mind the famous Resolution 242 of November, 1967. But this unquestionably is not yet the case. Such resolutions are not yet universally accepted; far from it, and indeed in regard to the Arab-Israeli conflict one of the points on which there seems to be general agreement is that peace cannot be imposed from outside. Both sides would be unwilling to accept an imposed settlement. Therefore, the settlement has to be made, or at least progress toward it at this stage has to be made between governments. I would therefore once again find myself in agreement with Professor Ramazani in saying that the next step should be full agreement among governments, taking full account of the rights and interests of the Palestinians, who at present cannot be actually represented in any negotiations, though in any settlement certainly their interests must be taken into full account.

I think that this has been a very useful and interesting discussion and certainly I may say that views converged just about as much as they do in similar discussions at the United Nations. Thank you so much.

Chairman Yost thereupon declared the meeting adjourned.

**New Developments in the Law of International Aviation:  
The Control of Aerial Hijacking**

(Sponsored jointly with the Canadian Society of International Law)

The session convened at 2:15 o'clock p.m. in the Congressional Room of the Statler-Hilton Hotel. Professor Edward McWhinney of McGill University presided.

**ADDRESS BY EDWARD McWHINNEY \***

Aerial hijacking is, as we all know, in positive law terms an essentially novel problem of the contemporary world community: analogies from the old custom-based international law as to piracy, and even from the relatively recent Geneva Convention on the High Seas' provisions as to piracy on the high seas or in any other place outside the jurisdiction of any state, tend to break down because of the very specificity of the elements of the offense as therein defined. To meet the problem, the legal response of the world community has largely been in terms of a treaty-based approach—the multilateral convention route to international law-making. One such convention, the Tokyo Convention of 1963, a relatively innocuous draft with no real teeth in it, took over six years to obtain the necessary minimum number of twelve ratifications to bring it into force, the United States being the twelfth country to ratify and Canada being even later. Now the Tokyo Convention has been supplemented by a further multilateral convention, signed at The Hague on December 16, 1970.

One of the difficulties with the treaty-based approach, apart from the rather sad time lag in following up initial signatures by subsequent official ratifications, and also the obvious dragging of feet in individual national ratifications, is that there is often little attempt to co-ordinate and reconcile new treaty ventures with already existing and established conventions in the same field. Commenting on the two multilateral conventions that are specifically concerned with hijacking—the Tokyo Convention of 1963 and The Hague Convention of 1970—a distinguished European jurist takes note of the incidental problems of legal interpretation presented by what he describes as the "*fait accompli* of the present co-existence—which cannot be ignored—of the two conventions, partly covering the same field, partly complementary, partly even contradictory."<sup>1</sup>

One of the reasons for the failure properly to assimilate the Tokyo Convention provisions as to hijacking to the new Hague text may have been,

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<sup>1</sup> See the remarks of Professor J. H. W. Verzijl, published in *Hijacking of Aircraft*, Institut de Droit International, Eighteenth Commission, Final Report, 1971, *Annuaire de l'Institut de Droit International*, Vol. II.

of course, the lack of full congruence of the special legal communities involved in the two conventions. For the significant difference here (and it may have very important political implications in terms of the possibilities of securing full and prompt ratifications of the Hague text), is that in the case of the Hague Convention, in contrast to the Tokyo Convention, the Soviet Union and the Ukraine and Byelorussia participated from the very outset in the conference proceedings and also signed the final text that emerged from the conference. Here we have, of course, for the first time with a major international convention involving aviation, that element of bipolar (Soviet-Western) sponsorship and support that has proved so vital to the political success of other really important ventures in international lawmaking in the post-Cold War era. In the hijacking area, however, there are other leading national actors involved, apart from the Soviet Union and the main Western countries, and their participation in and accord with the consensus expressed in the Hague Convention would appear to be rather crucial to that convention's prospects of becoming, finally, international law-in-action.

Discussion of this particular problem, of course, draws attention to the question of the extent to which the treaty-based approach (through the multilateral convention route) is necessarily the most effective legal means available for solving a new international law problem like hijacking. Indeed, it may even be suggested on the basis of the concrete aftermath of the Tokyo Convention of 1963, that the specification of an already extant international law obligation in the form of a norm of treaty-based law may actually, from the psychological viewpoint at least, weaken its pre-existing customary international law-based authority by suggesting that it is some sort of "new" international law principle which must run the gauntlet of formal adoption and ratification by states before it can become legally binding upon them or be considered part of general international law. How else, it may be asked, can we explain the current sad fate of that obligation of states, reproduced in Article 11 of the Tokyo Convention, to restore control of a hijacked aircraft to its lawful commander or to preserve his control of the aircraft; and to permit the passengers and crew of the aircraft to continue their journey as soon as practicable, and to return the aircraft and its cargo to the persons lawfully entitled to possession? This is an obligation of states which, as it has been pointed out,<sup>2</sup> already amply existed under general international law prior to and independently of the Tokyo Convention of 1963 or, for that matter, of the Hague Convention of 1970. Yet it has been systematically and flagrantly flouted in a growing number of cases over the last several years. The alternative legal possibilities to the multilateral-convention approach may be either a concentrating on the strengthening and extension of the existing, essentially custom-based *lex lata*—an undertaking to

<sup>2</sup> See for example, O. J. Lissitzyn, "Hijacking, International Law, and Human Rights"; E. McWhinney, "International Legal Problem-Solving and the Practical Dilemma of Hijacking," in *Aerial Piracy and International Law* (E. McWhinney, ed., 1971).

which scientific legal bodies like the *Institut de Droit International*, the International Law Association, and this Society, may be especially suited; or the exploring of the possibility of politically or geographically more limited, "regional," accords (perhaps proceeding through the infra-structure of bilateral air transport agreements on which the cohesion of international civil air transport so largely rests) which really would have some chance of being respected and enforced in action. In the dilemma presented by the choice between an international convention with teeth in it but in consequence very few ratifications; and a convention with very many ratifications but no great substantive law significance, the Tokyo Convention of 1963 would seem to have achieved the worst of all possible worlds—very little of an affirmative character to say; very few and very tardy ratifications.

This leads us on, of course, to a further question. How far should we, as international lawyers, feel ourselves limited to strictly *legal* modes of action; and how far, by contrast, should we look to other, alternative, non-legal forms of community control where the strictly legal controls seem irrelevant or unhelpful to solution of the problem? Treating the matter as an exercise in sociological jurisprudence, we would have to consider the efficacy both of the internal security measures applied by the commercial airlines themselves, and also the species of economic boycotts and similar pressures available to private non-governmental bodies like the International Air Transport Association and the International Federation of Airline Pilots Associations and actually successfully threatened to be applied by IFALPA in the case of a celebrated hijacking to Algeria in 1968. Of these potentially very promising forms of purely private, informal persuasion, it must be said that, apart from the risks of legal liabilities under various national laws to which those exerting them may expose themselves, the measures do seem to involve an element of "self-help" which might create undesirable precedents for the future. This, at least, seems to have been the view of members of the *Institut de Droit International* who considered the application of such measures recently and who preferred, instead, recourse to more traditional *legal* forms of social control.<sup>3</sup>

Reference to the Algerian hijacking of 1968 draws attention to the fact, confirmed and reinforced by the concerted hijackings to the Middle East in September, 1970, of the change in the nature and character of hijackings and of the individual hijackers themselves, from the relatively crude and amateurish affairs perpetrated by "lone-wolf," often moronic personality-types of the earlier "Cuban" era, to the technically quite accomplished and co-ordinated group hijackings of the latest Middle Eastern phase. Here not merely does the hijacking itself sometimes have wider political objectives, but third parties—usually the government officials of the state where the hijacked aircraft first lands—may choose to take political ad-

<sup>3</sup> See especially the comments by Professor Feinberg and by Professor von der Heydte, published in *Institut de Droit International*, Eighteenth Commission, Provisional Report, 1971 *Annuaire de l'Institut de Droit International*, Vol. II.

vantage of the hijacking and to seek to use the innocent passengers and crew and the aircraft itself as hostages in a larger game of international blackmail to which the act of hijacking itself is largely casual or irrelevant except so far as it happened (by deliberate design of that country or more often, perhaps, by chance) to bring the hostages within the clutches of the "host" country. Under these circumstances, our basic international legal characterization may have to undergo a change too.

When the political focus was on the hijacking act, as such, then the social problem of the world community was the interference with or interruption of international civil air services, and so the legal response tended inevitably to be firmly rooted in the international air transport and communication cluster of legal rules and principles.

When, however, the political focus shifted to the use of the passengers and crew of the hijacked aircraft as hostages for international blackmail purposes, with the actors so using the passengers and crew being sometimes recognized governments and sometimes quite unofficial political authorities or self-styled "national liberation fronts," then other and broader international law principles came to be invoked by those actors, involving, for example, general principles as to decolonization and independence proclaimed in various U.N. General Assembly resolutions in recent years. On this argument, the basic international law characterization shifts from the air transport and communication cluster of rules to those legal categories involving irregular or "privileged" combatancy and the status of participants in such combats, with the enquiry now being directed towards the distinction between legally permissible and legally impermissible forms and modes of conducting such combats.<sup>4</sup> And, of course, the political factors—significant even when we were confined within the air transport and communication cluster of rules, when they arose in the examination of the operation of the so-called "political exception" in extradition proceedings—now tend to become all-pervasive.

When different actors can properly classify the same legal problem-situation in radically different ways, depending upon their own particular value-orientation or ideological preconceptions, we are left with what the distinguished legal philosopher, Lon Fuller, has identified as a basic condition of polypolarity. In the current great political conflicts involving the holding to political ransom of hostages who have been plucked from hijacked aircraft, to vindicate the concept of freedom of communication may involve trying to postulate it as something in the nature of an *imperative* principle of international law that ranks, as such, in hierarchical superiority to other principles. The argument here might proceed on the basis that the principle of freedom of communication in the air has been proclaimed in treaty form as early as the Chicago Convention of 1944; that it has been expressly accepted by the World Court in the special

<sup>4</sup> See generally, my discussion in *Aerial Piracy and International Law* (1971); and see also the comments by Professor Bastid, published in Institut de Droit International, Eighteenth Commission, First Report, 1971 *Annuaire de l'Institut de Droit International*, Vol. II.

context of maritime communication,<sup>5</sup> and that this is fully capable of analogical extension so as to cover air communication; and that such a principle is necessarily one of the minimum legal ground rules of a world community seeking to move on from a somewhat negative condition of legal coexistence of differing political and social systems, to some more affirmative international law that stresses the positive obligations of cooperation among states and the mutuality and reciprocity of their interests.

The CHAIRMAN introduced the first speaker, Mr. K. E. Malmberg, Jr., Assistant Legal Adviser, Department of State.

### ADDRESS BY K. E. MALMBORG, JR.\*

Since early 1969, many of the international aviation law experts of the world have been meeting virtually every two or three months to discuss the principles of international responsibility for hijacking and other attacks on civil aircraft and to prepare multilateral conventions to deal with the spreading problem of such attacks. As a result of that discussion and the conventions prepared and under preparation, a new set of principles of international law has emerged. I believe that this development reflects the viability of international law and its ability to adapt old forms to novel problems. Most remarkable, perhaps, is the speed with which this has been done.

I wish to emphasize that I am not talking about treaty-based international law in the sense of application only to those states which are parties to a particular multilateral convention.

I would like to summarize, first, the principal provisions of the several conventions and then the interrelationship of those provisions to the emergent principles of customary international law. I will also mention some related developments in bilateral extradition practice.

#### THE CONVENTIONS

##### *Tokyo Convention*

The first convention in time to deal with the problem of offenses aboard aircraft was the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (the Tokyo Convention).<sup>1</sup> After a slow start, some thirty-seven countries, including the United States, had become parties to this convention by the end of 1970. On October 14, 1970, the President approved implementing legislation<sup>2</sup> which expanded the special aircraft jurisdiction of the United States.

The Tokyo Convention has a number of provisions that are of assistance in dealing with the hijacking problem, but its principal emphasis is on

<sup>5</sup> International Court of Justice. Reports of Judgments. Judgment of April 9th, 1949 (The Corfu Channel Case (Merits)), I.C.J. Reports 1949, p. 22.

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<sup>1</sup> 20 U. S. Treaties 2941; T.I.A.S., No. 6768.

<sup>2</sup> Public Law 91-449.



assuring that at least one state will have criminal jurisdiction over offenses committed on board a civil aircraft in flight. Of major significance for the present discussion, however, are the provisions of Article 11 of the Tokyo Convention relating to release of the passengers and crew of a hijacked aircraft and return of the aircraft and its cargo. As early as 1968, there was a unanimous resolution of the ICAO Assembly<sup>3</sup> calling on ICAO members to apply Article 11 even before the entry into force of the convention.

### *Hijacking Convention*

In 1969 the United States proposed that the International Civil Aviation Organization (ICAO) consider a new international convention to supplement the Tokyo Convention and deal specifically with the problem of aircraft hijacking. The United States also proposed a draft for consideration.<sup>4</sup> That draft was initially conceived as a Protocol to the Tokyo Convention and directly tied into the provisions of Tokyo. It constituted a multilateral mandatory extradition convention limited to hijackers of any aircraft in flight which was carrying passengers for hire. The draft contained the procedural protections that are normally found in extradition treaties. This proposal was rejected, as was a compromise which would have created an obligation to prosecute if extradition was refused on the ground that the offender was sought for political persecution.<sup>5</sup> The idea of a Protocol to the Tokyo Convention was also rejected, but the ICAO Legal Subcommittee and Legal Committee had the objective of assuring that states could become parties to both conventions without inconsistent obligations. In March, 1970, the ICAO Legal Committee approved a draft convention.<sup>6</sup> Up to this point, essentially the same mechanism was used to develop the Hijacking Convention as had been used to prepare the Tokyo Convention. Many of the members of the ICAO Legal Committee personally participated in the drafting of both conventions. The Legal Committee product was then reviewed and strengthened in a conference of governments at The Hague from December 1 through 16, 1970. We are not aware of any inconsistencies with the Tokyo Convention, and certainly none was intended.

A major reason for the strengthening of the convention was the fact that between the Legal Committee meeting and the Conference at The Hague there occurred a series of hijackings for what we have called international blackmail purposes. This was the forcible seizure and diversion of civil aircraft, not to flee from one country to another, but to hold the aircraft, passengers and crew hostage for specific demands—in that case release of Arab guerrilla terrorists from prison or custody. Another key factor, perhaps, was the fact that the Soviet Union suffered two successful

<sup>3</sup> Res. A 16-37.

<sup>4</sup> ICAO Doc. LC/SC.SA WD7 (5/2/69).

<sup>5</sup> Report of ICAO Legal Subcommittee on Unlawful Seizure, 8 Int. Legal Materials 245 (March, 1969); see also Wurfel, "Aircraft Piracy—Crime or Fun," 10 William & Mary Law Rev. 867-871 (1969).

<sup>6</sup> 9 Int. Legal Materials 669 (July, 1970).

hijackings just before the Hague Conference and came to that conference with a bloc of votes favoring a stronger convention. The Soviet Union had just become a member of ICAO and had not participated in the work of the Legal Committee.

Let me briefly describe the significant strengthening that occurred at The Hague:

(1) Two new mandatory bases for the exercise of jurisdiction were added: (a) jurisdiction based on the lease of an aircraft without crew to a person whose principal place of business or residence is in a Contracting State, and (b) jurisdiction based upon the alleged offender being found in the territory of a Contracting State and upon the failure of that State to extradite him.

(2) Contracting States are required to facilitate continuation of the journey of the passengers and crew of a hijacked aircraft and return the aircraft and cargo to lawful possession without delay.

(3) Contracting States are required to report to the ICAO Council any available information about a hijacking including the disposition of the offender.

(4) A Contracting State in which an alleged offender is found is required, if it does not extradite him, to submit the case "without exception whatsoever" to its competent authorities for the purpose of prosecution.

As of April 15, 1971, when President Nixon transmitted the Hijacking Convention to the Senate for advice and consent,<sup>7</sup> fifty-nine states had signed the convention. On April 19, 1971, Japan became the first state to deposit its instrument of ratification. Perhaps even more significant is the fact that of seventy-seven countries attending the conference, there were no negative votes, and only two abstentions, to the adoption of the final text embodying the provisions I have described.

Since such a large number of states have accepted the principles of the Hijacking Convention, I wish to emphasize for purposes of the present discussion two provisions of that convention. The first requires each Contracting State to provide a basis for prosecution of a hijacker, regardless of where the hijacking occurred, if the hijacker is found in its territory—universal jurisdiction. The second requires each Contracting State "without exception whatsoever" to submit the case of a hijacker found within its territory to its competent authorities for the purpose of prosecution, unless it extradites him.

#### *Convention on Concerted Action*

The reason I have stressed particular provisions of the Tokyo Convention and the Hijacking Convention is because those provisions provide a point of departure for still a third multilateral convention that is now being prepared. The impetus for this convention came from the international blackmail hijackings of last fall, which I have already mentioned. That kind of hijacking created a new, urgent and drastic threat to international civil aviation; one calling for more severe international measures

<sup>7</sup> Exec. A, 92nd Cong., 1st Sess., April 15, 1971.

than would have been considered possible a year ago. The fact that hijackings were used to achieve political objectives in themselves, rather than to flee from or to a particular place, made clear the need for some kind of economic or political muscle to be applied to offset the political advantage that states might see in going along with a political hijacking.

The United States and Canada co-sponsored an ICAO Council resolution last fall.<sup>8</sup> As adopted by the Council on October 1, the resolution provided a basis for states to take concerted action, including suspension of air services, against states which failed to live up to their international obligations in these blackmail cases. That is an action by the international civil aviation community that is an accomplished fact and a recognition that economic sanctions are a legitimate response to international blackmail hijackings.

The United States also tabled a draft convention which would have made such concerted action binding on Contracting States once a determination of default had been made and an action agreed upon. This draft was given preliminary consideration by the ICAO Legal Committee at a meeting in London last October, and a Legal Subcommittee was set up to continue that consideration. The Legal Subcommittee has met this month; however, it has just completed its meetings, and it is premature to comment on the results. It is significant that such a subject has been the subject of several weeks of serious international discussion with a view toward preparing a convention.

The United States and Canada submitted a revised joint draft of a convention this month. That draft contemplates a two-step procedure. As the first step, a fact-finding body would determine whether a state has failed to comply with its international obligations either:

- (1) in the case of a hijacked aircraft landing in its territory, failing to let the passengers and crew continue their journey, or to return the aircraft; or
- (2) in the case of a person found within its territory who has committed a hijacking or other act of unlawful interference, failing to extradite or prosecute that person if (a) the hijacking resulted in the detention of the aircraft, passengers or crew, or (b) the unlawful interference resulted in the destruction of the aircraft or death or physical injury to a person on board.

In introducing this proposal, the United States representative said:

The international civil aviation community now has, on the books or in well-advanced stage of preparation, conventions which describe the obligations of States with respect to the acts of hijacking or sabotage of civil aircraft and of detention of aircraft, passengers, or crew of such aircraft. You will note that I said that these conventions "describe" the obligations. This is the case because the obligations are not dependent upon being a party to the individual conventions but reflect accepted principles of international responsibility.

This statement reflected a judgment that by virtue of embodiment in conventions widely accepted by signature, of endorsement by ICAO Assembly

<sup>8</sup> 63 Department of State Bulletin 449-453 (Oct. 19, 1970).

and United Nations General Assembly resolutions which were broadly supported, and of application in general practice, the principles mentioned had emerged into principles of international law.

Before returning to this point, let me just finish describing the concerted action draft convention and also describe the final convention being prepared by ICAO.

The second step of the two-step procedure in the joint United States-Canada draft convention provides for a separate decision by states on what action to take in concert against a state determined to be in default. If the action decided upon, as a result of consultation under the convention, involves suspension of air services, a majority of states providing such services must agree to that suspension. A decision once taken would be binding on all Contracting States, whether or not they were part of the majority.

#### *Sabotage and Other Acts Convention*

In the spring of 1969, explosions destroyed a Swiss aircraft and badly damaged an Austrian aircraft. These incidents focused the attention of ICAO on sabotage and other violent attacks directed against international civil aviation. An extraordinary ICAO Assembly meeting in Montreal last June approved a series of specific airport and aircraft security measures and also called for the ICAO Legal Committee to consider a convention directed against such attacks.

The ICAO Legal Committee completed its work on that convention last fall, and it is now scheduled to be considered by a conference of governments beginning in September, 1971. Apart from the description of the offense, this convention is similar in most respects to the Hijacking Convention.

#### EMERGENT PRINCIPLES

From the Cold War days when the crew of aircraft straying into foreign airspace might expect to be detained, if not shot down, we have seen develop an international practice by states based on the principles expressed in Article 11 of the Tokyo Convention, where the aircraft, crew and passengers (unfortunately except for the hijacker) are promptly permitted to resume their trip. This is in large part attributable to the mobilization of the international civil aviation community—states with airlines, aviation organizations, air transport workers associations—to bring practical pressure to bear to ensure that these principles are applied.

As you know, there have been some dramatic departures from these principles and, more recently, a situation where the government concerned did not have the power to secure the release. Nevertheless, we are confident that the principles first incorporated in Article 11 of the Tokyo Convention and subsequently elaborated in the Hijacking and Sabotage Conventions are now accepted practice of states and a part of international law not dependent upon treaty. Article 11 of the Tokyo Convention, at least, is generally accepted as expressing an international norm of conduct. We know of no state that has said it does not accept this norm, even when its actions belie that conclusion.

The principle of extradition or prosecution is a little newer on the scene with respect to aircraft hijackers, but we believe it is soundly based on the international law of state responsibility. When applied, as in the joint United States-Canada draft convention, to cases where a foreign aircraft or its passengers or crew are in fact detained in the territory of a state or that aircraft is destroyed, or persons on board are injured or killed, the principle of prosecution of the offender is well established in international law.<sup>9</sup> Of course, where authorized by the extradition law or treaties of that state, it may satisfy its obligations by extradition of the offender.

The message is clear, however, that even before the Hijacking Convention enters into force, we, and I think most states with a significant interest in international civil aviation, will expect any state which receives a hijacker to accept responsibility for prosecuting him. I think that it will be hard to take issue with that expectation.

Turning now from general principles described in multilateral conventions to specific legal obligations dependent upon entry into force of a particular convention, the Hijacking Convention substantially broadens the extradition alternative. It is not in itself a legal basis for extradition from a country which requires an extradition treaty. Thus, bilateral negotiations still have an important role.

#### BILATERAL EXTRADITION AGREEMENTS

In 1969 and 1970 the United States initiated negotiations for new or supplementary extradition agreements with sixteen countries. In each case, the offense of hijacking is included and commission of the offense on board aircraft outside our territorial jurisdiction is covered. In addition the United States is attempting on a selective bilateral basis to negotiate extradition provisions that will close the political offense loophole in existing treaties, at least for the hijacker of a commercial aircraft carrying passengers. We have reached such agreements with Spain<sup>10</sup> and Italy.<sup>11</sup>

The CHAIRMAN introduced Professor Oliver J. Lissitzyn of the Columbia University School of Law.

### INTERNATIONAL CONTROL OF AERIAL HIJACKING: THE RÔLE OF VALUES AND INTERESTS

*By Oliver J. Lissitzyn \**

What are the limitations of the new Convention for the Suppression of Unlawful Seizure of Aircraft as an effective instrument for the prevention of aerial hijacking? And what are the reasons for these limitations?

<sup>9</sup> 8 Whiteman, Digest of International Law, Ch. XXIV, Sec. 4.

<sup>10</sup> T.I.A.S. 7136; signed May 29, 1970; in force June 16, 1971.

<sup>11</sup> Italian treaty not yet signed.

\* Columbia University School of Law.

The answers to these questions involve a consideration of the diversity of values and interests in the world community. Indeed, the problem of hijacking presents a good illustration of the rôle of this diversity as an impediment to the development of truly effective international law.

At the outset, it is important to note that the phenomenon of aerial hijacking appeared on the international scene as a result of deep political cleavages in the international community. The first cases of hijacking occurred in Europe after World War II, when aircraft began to be seized by persons seeking to flee to the West from the oppressive regimes instituted by the Communists in East Central Europe. In the Western Hemisphere there were virtually no hijackings of aircraft before the advent of Fidel Castro to power in Cuba. Political conflicts between Israel and the Arabs, India and Pakistan, and the Communist and non-Communist governments in East Asia account for most of the other cases of hijacking. The very few cases in which deep political cleavages were not involved (as in the diversion of United States aircraft to Italy or Canada) probably would not have occurred but for the wide publicity given to the many successful hijackings in situations of political conflict.<sup>1</sup>

The limitations on the effectiveness of the new convention fall into three categories: provisions for extradition; provisions for punishment; and the extent of acceptance of the convention.

There is wide agreement that the convention would have maximum deterrent effect if it were accepted by all states and if it provided for extradition without exception (that is, for what may be here called, for convenience, "mandatory extradition") of all persons accused of hijacking to the state of registration of the aircraft. It is too early to tell how widely the convention will be ratified, but it clearly does not call for "mandatory extradition."

Why does it not? Why could no agreement be reached for such extradition? Here the rôle of the diversity of values and interests is particularly evident. The values and interests that would be served by the undeniable maximum deterrent effect of "mandatory extradition" had to be balanced against other values and interests. Support for "mandatory extradition" came mainly from two sources: First, from the circles most directly and continuously concerned with commercial aviation, including airline managements, airline labor, aviation insurers, and national and international officials whose functions are primarily those of promotion or regulation of aviation; and, second, from the two governments that for different reasons were most concerned with the hijacking problem in 1970—those of the United States and of the Soviet Union. The United States Government was concerned because by far the largest number of aircraft seized by hijackers (between one third and one half) were of United States registration and ownership. The Soviet Government was

<sup>1</sup> For statistical and other information on aerial hijacking, see A. E. Evans, "Aircraft Hijacking: Its Cause and Cure," 63 A.J.I.L. 695 (1969); Aircraft Hijacking, Hearings before the Committee on Foreign Affairs, U. S. House of Representatives, 91st Cong., 2nd Sess., Sept. 17-30, 1970; and U. S. Department of State, United States Foreign Policy 1969-1970, A Report of the Secretary of State 247-250 (1971).

concerned, despite the very small number of Soviet aircraft that had been hijacked, because the total control of the population on which its power rests seemed to be endangered by the opportunities for escape that hijacking could afford.

Ranged on the other side were those concerned with human rights or with special political interests and relationships.

Why is the concern with human rights relevant? "Mandatory extradition" could mean that persons fleeing from countries in which they are denied human rights and the freedom to leave would have to be surrendered to those very countries if they had successfully resorted to the only means of escape practically available to them—hijacking of aircraft. In this connection, two kinds of hijacking must be distinguished. One is where the very purpose of hijacking is to kidnap or otherwise injure somebody, or to detain or destroy property. This kind includes so-called hijacking for international blackmail purposes, as exemplified by the diversion of several Western aircraft to the Middle East in September, 1970, which shocked world opinion. The purpose is to deprive innocent passengers and crews of freedom, and to threaten their lives or the destruction of aircraft, as a means of inducing compliance with the hijackers' political or pecuniary demands. Most of the cases of hijacking, however, are of another kind, what I call hijacking for travel purposes, with no specific aim of hurting anybody or damaging anything in the aircraft. This kind of hijacking is, of course, also criminal, since it involves threats of injury, and all who perpetrate it deserve punishment. But it must be noted that the number of injuries actually resulting from such hijacking has been rather small. In fact, practically all of the injuries in these cases resulted from attempts to resist the hijacker. And it is with respect to this second kind of hijacking—"travel hijacking"—that concern for human rights is most pronounced and justified. Indeed, many nations have a tradition of political asylum that they do not want to give up completely in the case of hijackers.<sup>2</sup> We may recall that even within the United States, a Federal Union, States sometimes refuse to surrender fugitives to other States, despite a seemingly clear Constitutional provision that requires surrender.<sup>3</sup> Such refusals are generally due to the belief that the fugitive will not be treated justly in the requesting State; in other words, that he will be denied human rights. If this happens within a federal union, it is easy to see that within the world community, where the diversity of the concepts of justice and human rights is much greater, there can be no universal agreement to extradite all hijackers without exception. Indeed, it is questionable whether the United States would or should accept such an obligation. Imagine, for example, a group of persons whose rights are severely limited in the Soviet Union, and who are refused permission to leave, successfully hijacking a Soviet aircraft and flying in it to Alaska. Would public opinion in this country permit their extradition?

<sup>2</sup> Cf., in this connection, G. White, "The Hague Convention for the Suppression of Unlawful Seizure of Aircraft," ICJ Review, No. 6 (April-June, 1971), 39.

<sup>3</sup> U. S. Constitution, Art. IV, sec. 2.

Proponents of "mandatory extradition" argue that the need to protect world air transport and its users from the perils, costs, and annoyances of hijacking should outweigh concern for the rights of individuals who choose this means of escape from a tyrannical regime. They correctly point out that hijacking itself deprives innocent passengers and crews of certain human rights, even if only temporarily. But the weighing of the competing values involved is necessarily subjective.<sup>4</sup> One item to be put in the balance is the fact that "travel" hijackings, despite their large number, have actually produced very few injuries. A large part of the world is not convinced that the human rights of persons who resort to "travel" hijacking as a means of escape and who are likely to be deprived of the benefits of "due process of law" if they are returned to face the mercies of a totalitarian regime should be subordinated to the interests adversely affected by hijackings in general. Indeed, a convention providing for "mandatory extradition" would probably obtain so few ratifications that it would hardly be worth writing. Even the United States might not be able to become a party to it, because of opposition in the Senate which would reflect public opinion. In this connection, it must be noted that the traditional concept of "political offenses" is too narrow and misses the point. The relevant consideration is protection of human rights, and not just of "political offenders."

Concern for human rights, however, is not the only obstacle to the acceptance of "mandatory extradition." Some states would be reluctant to assume an obligation which would compel them to extradite persons with whom they are linked by political sympathy or ethnic affinity. In some situations it may be difficult to distinguish such a special interest from real or ostensible concern for human rights.

If extradition is not granted, the alternative is punishment in the state of landing or some other state that has custody of the suspect. Under Article 7 of the new convention, such a state has the duty to refer persons accused of hijacking, if they are not extradited, to its competent authorities for the purpose of prosecution. The contracting parties, moreover, are required by Article 2 to make the offense of hijacking "punishable by severe penalties." The practical effectiveness of these obligations, however, is open to doubt. The last sentence of Article 7 specifies that the authorities competent to prosecute "shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." Although this sentence may be designed to exclude favoritism based on political or other extraneous considerations, it may be difficult to show that the prosecutors failed to proceed with prosecution for improper reasons. As we all know, a measure of discretion in deciding whether to prosecute a person accused of a crime is inherent in the realities of the judicial process. And prosecution, of course, does not guarantee conviction and punishment. No treaty provision can completely prevent courts and juries from being swayed by sympathy for the accused.

<sup>4</sup> See, further, my paper, "Hijacking, International Law, and Human Rights," in E. McWhinney (ed.), *Aerial Piracy and International Law* (1971).



Furthermore, what is a "severe" penalty? The convention does not define it. Legislation and actual decisions in various countries suggest that the international standard of severity in such cases is by no means well defined. In the United States, a Federal statute enacted in 1961 prescribes the penalty of death or not less than twenty years in prison.<sup>5</sup> In actual cases, no death penalty has ever been imposed, but prison terms have ranged from life (in only one case) to much less than twenty years, the latter made possible by the application of laws other than the anti-hijacking statute of 1961. In the Soviet Union, several persons recently tried on charges of planning or attempting to hijack Soviet aircraft were sentenced to death, but their sentences were reduced on appeal to fifteen years in prison, the maximum imprisonment permitted by Soviet law. It should be noted that they were charged, not under a law specifically applicable to hijacking, which apparently is lacking in Soviet legislation, but rather under that forbidding attempts to leave the country without permission. A French statute enacted in 1970 prescribes penalties of five to ten years in prison for simple hijacking, ten to twenty years for hijacking resulting in injury or illness, and life imprisonment for hijacking resulting in death.<sup>6</sup> In Western European countries penalties imposed on hijackers fleeing from states in the Soviet bloc have been mild, generally ranging from one to six years in jail.

The diversity of values and interests is evidently at work. Laws that provide for extremely severe penalties may be counter-productive, by making judges and juries reluctant to convict. It may well be, incidentally, that the very high penalties required by our own anti-hijacking statute may make extradition of some offenders to the United States more difficult. It should be amended by eliminating the death penalty and setting a lower minimum penalty than twenty years. One possible interpretation of the word "severe" in terms of American law is that it only requires making hijacking a felony rather than a misdemeanor. As you know, a felony may be punishable by as little as one year in prison. Diversity in national standards of severity, furthermore, may be reflected not only in the statutory provisions for penalties, but also in the relative ease of placing convicted offenders on probation or parole. There is, in brief, no assurance that the new convention, even if generally ratified, will result in sufficiently severe penalties in all cases to serve as an effective deterrent.

There is, furthermore, no provision in the convention for its enforcement against delinquent states. Article 12 provides for the settlement of disputes arising under the convention by arbitration or the International Court of Justice, but it also specifies that any state may at the time of signature or ratification of the convention or accession thereto declare that it is not bound by this provision. Even if there should be a finding by an arbitral tribunal or the International Court that a state has violated the convention, the question of enforcement of such a decision is left open.

<sup>5</sup> 75 Stat. 466, 49 U.S.C. §1472(i).

<sup>6</sup> 10 Int. Legal Materials 436 (March, 1971).

As Mr. Malmberg has told us, it has been proposed that in cases of what may be called aggravated hijacking, states delinquent in their obligations under the convention may be made liable to interruption of their air transport relations with other states. But I doubt very much that this proposal, which is intended to be embodied in a separate convention, will be accepted and actually implemented by a sufficient number of states to provide an effective sanction, although it is worth a try.

The effectiveness of the convention will, finally, depend on the number and kinds of states that will ratify or accede to it. It is quite likely that it will be ratified fairly soon by the number of signatories (ten) required to bring it into force as between those states. By itself, however, this will hardly suffice to make the convention really effective. Furthermore, it is not only the number of ratifying states that counts, but also their characteristics. Ratification by states that have not been, and are not likely to be, involved in hijacking incidents is not as important as ratification by states, relatively few though they be, that have frequently served as the hijackers' destination. Yet it is precisely such states, including Cuba, the Arab nations, and North Korea, that are least likely to ratify. The practical usefulness of the convention may also be affected by the reservations that states may choose to attach to their ratifications or accessions. The convention has no general provision concerning reservations, but, as already noted, permits a reservation to the dispute-settlement clause of Article 12. It does not specify that no other reservations may be made, and it may be argued, therefore, that they are not forbidden. Only the future can tell whether reservations will seriously detract from the effectiveness of the convention.

It must be concluded that the limitations on the effectiveness of the new convention will probably prevent it from really solving the hijacking problem. It is, nevertheless, a useful step forward and should be ratified as widely and promptly as possible.

How effective are regional and bilateral agreements likely to be? As I have pointed out, hijacking became a significant international problem because of the political cleavages in the world community. These cleavages are just as likely to interfere with effective solutions of the problem on a regional as on a universal basis, since they occur within as well as between regions. The pairs of states or groups of states whose political conflicts have encouraged hijacking include the Soviet bloc *vs.* the Atlantic community; Israel *vs.* the Arabs; India *vs.* Pakistan; Cuba *vs.* other American republics; and Communist *vs.* non-Communist states in East Asia. Efforts to obtain effective agreements between the political adversaries within each region are not likely to succeed. Agreements between friendly and like-minded states within each region are possible and desirable, but are likely to be of limited practical value. This is also true of bilateral agreements. Such agreements may serve to discourage the occasional hijacker who wants to take an aircraft to a state which is friendly with the state of registration, if he is sane and aware of the agree-

ments, but they cannot be relied upon to deter the much more frequent hijackings in situations of political or ideological conflict.

Since the diversity of values and interests in the world community is likely to continue to prevent, for a long time to come, the conclusion of fully effective international agreements to control aerial hijacking, governments and non-governmental entities concerned with the prevention of this offense must continue to utilize and improve other methods of dealing with it.

The CHAIRMAN introduced the first commentator, Professor Andreas F. Lowenfeld of New York University School of Law.

### COMMENTS BY ANDREAS F. LOWENFELD \*

I must say at the outset that when I was asked to appear as a commentator here I did not know that I was going to have to comment on Gene Malmberg's paper. He is, of course, an old friend and co-worker, but usually his papers leave me speechless. So I am not sure that I have very much to say, except that at the time we worked together, I would never have let him get by with a word like "emergent." I do not know whether that word refers to something that is newly developing, as in "emerging" or whether it is something that is an "emergency" or perhaps both. In any event, he is quite right in pointing out that the development in this area has been much more rapid than anyone could have expected. In a different context I have commented in the past on the rather glacial tempo of the International Civil Aviation Organization, particularly its Legal Committee.<sup>1</sup> There is no question that there has been rapid movement in this area; and, as Professor Lissitzyn pointed out, the events of Labor Day, 1970, certainly accelerated the enthusiasm.

I would say that I share some of the doubts that Professor Lissitzyn has expressed about the effectiveness of the treaty route, for one additional reason that we saw over the Labor Day weekend: the problem of hostages. You will recall that during that weekend one of the hijackers, Leila Khaled, was in fact captured, held in custody in London, and then exchanged. Two prior groups of hijackers were also exchanged. These exchanges had to be made, for there was no other way for obtaining the release of the hostages held in the Jordanian desert. Because of this type of occurrence, much of the effort at extradition or local punishment is likely to fail. Thus, while I am not opposed to the proposals that Mr. Malmberg has outlined, I have some reservations about them.

I would like to make a few comments with respect to the previous presentations. It seems to me that, as in so many areas of law, we are faced

\* New York University School of Law.

<sup>1</sup> See, e.g., Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention," 80 *Harvard Law Rev.* 497, 549-550 (1967); Lowenfeld, "The Warsaw Convention and the Washington Compromise," 70 *J. Royal Aeronautical Soc.* 1061, 1063 (1966).

with a series of trade-offs. Mr. Malmberg has emphasized the problem of law enforcement and the security of air commerce (which is increasingly becoming the principal means of international transportation), and Professor Lissitzyn has emphasized the problems of human rights. There is a trade-off here, and I am not quite sure about my own position. In particular, what about political offenders? One could, for instance, make the argument that whatever else a person may have done or may be wanted for in a particular country, hijacking itself is not a political offense. It is an internationally defined crime. But that argument runs into some of the problems that Professor Lissitzyn brings out about people trying to escape, and it used to be that we viewed people who escaped from Iron Curtain countries as heroes. Some of you may remember the locomotive engineer who brought a train from Czechoslovakia to West Germany and was honored by a parade. As I recall, when he came to the United States he was made an official of the Lionel Train Company.<sup>2</sup>

Seriously, the question of what to do about political offenders is a very hard one. I have tried to formulate an international definition of a political offender, and have found it very difficult. Take, for example, the case of Angela Davis. She tried to resist extradition from New York, arguing that she was being framed and put on trial for her political views. The Governor of New York rejected these claims and in fact did return her to California. But how would another State, or even Canada, our Chairman's country, feel about this case? She stands accused of a common crime of aiding and abetting a homicide, but maintains she had nothing to do with it, that it was nothing but a frameup because she is black and a Communist. It is very difficult to make this kind of distinction.

Some of you may be familiar with a famous case which occurred in France a few years ago: the case of two Greek patriots who took an Olympic Airways plane headed from New York to Athens, with a stop in Paris.<sup>3</sup> They merely passed out pamphlets in favor of Greek democracy and denouncing the colonels, and unfurled a banner supporting democracy in Greece. The taking of the plane was clearly a political act, designed only for that purpose. No one was injured. The answer in this case is difficult, but the case directs attention dramatically to the trade-off between the question of aircraft security and the question of political expression.

If Professor Lissitzyn is right in arguing that the treaty route has its limitations, perhaps the alternative is to make better detection machinery available. Not every plane has the benefit of the present detection machines, and some of the machines may even be dummies. The machines, which consist of two poles and the detector, are normally quite visible. To my knowledge, about one person in eight or ten makes the machine light up. A certain amount of ferrous metal, such as an ashtray, certain types of

<sup>2</sup> For this and similar episodes, see 6 Whiteman, Digest of International Law 799-820 (1968).

<sup>3</sup> *Olympic Airways v. Panichi and Giovine*, 32 Rev. Générale de l'Air 356 (Cour d'Appel, Paris, 1969).

keys, or a lady's compact might be sufficient to trigger the mechanism. But what happens if the machine lights up?

Most people do not object to being searched. Under the United States statute, passage can be denied to the person who refuses to be searched,<sup>4</sup> and I do not have any Constitutional problems with that kind of provision. On the other hand, if that is the only sanction, then the deterrence is not very great. There is always the opportunity of trying again with another airline. For instance, on the Labor Day weekend the people who hijacked the Pan Am plane had previously attempted to board an El Al plane at Frankfurt and had been turned back, but they were not detained and so they managed to get on Pan Am. Thus it would obviously be much more effective to immediately detain and arrest anyone who fails to submit to search, or perhaps specifically compel him to be searched.

The type of situation mentioned above again points to trade-off. Some experts in civil liberties may argue that merely passing some poles sensitive to metal is not sufficient basis for "probable cause" for a search. The Supreme Court attempted to draw some lines on this issue in three decisions handed down in June of 1968. Two of these were *Terry v. Ohio*<sup>5</sup> and *Sibron v. New York*.<sup>6</sup> In the first case a policeman, who had been on the force for 39 years and a detective for 35 of them, approached some people who had been walking back and forth for several hours, pretending to be casual but always stopping and looking at the same store window. He asked what they were doing, and then, not having received a satisfactory answer, pushed Terry into a corner and pulled out of his pocket a .38 caliber revolver. His experience had enabled him to recognize a lumpy object in Terry's pocket as a gun. A subsequent conviction for carrying a concealed weapon was appealed eventually to the Supreme Court. The Supreme Court, with Chief Justice Warren writing the opinion, decided that there had been probable cause for the search. In contrast, *Sibron* concerned a person who was observed talking to some known narcotics violators. A plainclothes officer asked him what was in his pocket and then reached in, before Sibron could get to it, coming up with a wad of heroin. In this case the Supreme Court held that there had been no probable cause. Where, in the range suggested by these cases, the passenger who refuses to submit to a search fits in remains unanswered. Although it is not possible to decide definitely, the trade-offs must be borne in mind.

Mr. Malmberg has mentioned the notion of sanctions against non-signing states. From the point of view of making extradition (or prosecution as an alternative) a really effective deterrent, it is necessary to have everybody sign. Even then it may not be complete; if but one state does not sign, then presumably most planes could be taken there. Thus the notion of a sanc-

<sup>4</sup> Federal Aviation Act of 1958, as amended, Sec. 1111, 49 U.S.C. 1511 (1964).

<sup>5</sup> 392 U.S. 1 (1968).

<sup>6</sup> 392 U.S. 40 (1968). The third case, in which certiorari was denied over the dissents of Justice Fortas and Chief Justice Warren, is *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

tion against non-signers is in many ways very appealing. On the other hand, there is some reluctance to bind non-signatories if treaty law is viewed as equivalent to contract law. Here I am inclined to agree with Mr. Malmberg's contention that we are concerned with emerging (or emergent) international law rather than mere contract law. In this regard there is the analogy of the United Nations Charter, which is made applicable, in Article 2(6), to non-members. In other words, the Organization is obligated to see that the principles in the Charter are observed by all states. The Korean conflict is probably the best example of the enforcement of this principle. Another illustration of this general principle is provided by the International Coffee Agreement. When it became clear that non-members were being used as conduits for extra-quota exports of coffee, a resolution was passed<sup>7</sup> (which is now in the amended Coffee Agreement)<sup>8</sup> in effect authorizing discriminatory trading practices against non-signatories. It is also, of course, an inducement for non-signatories to sign and obtain a quota. Thus I think we have some precedents for this principle, but again you see the trade-offs.

I would like to make a final comment on the question of Cuba. It is interesting to note that Cuba has, not only in public statements but also in its own legislation, come out quite strongly against hijacking.<sup>9</sup> As I understand it, Cuba is prepared to sign a bilateral agreement or even a multilateral agreement, but for obvious reasons not one that is under the aegis of organizations like the Organization of American States. What, then, about an arrangement between the United States and Cuba relating to hijacking? In one sense, of course, there are the political problems, the asylum problem intrudes to a very great extent. But the notion that you are unable to make a bilateral agreement with somebody with whom you do not maintain diplomatic relations is somewhat old-fashioned; it may be worth asking whether hijacking is not at least as serious a game as ping pong. Thus, perhaps it would be worth thinking about this, even with longer-range Caribbean diplomatic relations in mind.

The CHAIRMAN introduced the second commentator, Professor Alona Evans of Wellesley College.

### COMMENTS BY ALONA E. EVANS \*

In respect of the matter of investigating would-be hijackers boarding planes, to which Professor Lowenfeld referred, you may recall that on April 22nd of this year a passenger went through the searching process and then boarded the plane which he subsequently tried to hijack. Ap-

<sup>7</sup> International Coffee Organization, Res. 117 (ICO Doc. No. ICC-8-Res. 117E (1966)).

<sup>8</sup> International Coffee Agreement, 1968, Art. 45, 19 U.S.T. 6333, T.I.A.S., No. 6584 (Dec. 30, 1968).

<sup>9</sup> Law of Sept. 16, 1969, reproduced in 8 Int. Legal Materials 1175 (1969).

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parently the captain of the plane called in and said: "I'm being hijacked." And ground control inquired: "Who's hijacking you?" He responded: "So and so." "It's okay," came back from the ground, "he's clean." And that was that.

I agree with Mr. Malmberg that there is a great deal of merit in the Tokyo and Hague Conventions. These conventions are an expression of international opinion, which can have a very powerful effect. Moreover, states that are "once burned will be twice shy" of hijacking, even if the conventions *per se* do not penalize the offense. In addition, there is, I think, emerging international law here. One may question whether the Hague Convention of December, 1970, is not lawmaking rather than declaratory in extending the concept of universal jurisdiction to hijacking. But, nonetheless, it is possible to make a strong case, as Mr. Malmberg has, for other existent international law which can be used as the basis for arguing that the crime of hijacking is recognized and that action can be taken thereunder.

What action should be taken, and what is involved? Certainly the matter of obtaining custody of the accused is a very serious concern. There have been a few voluntary returns, and one wonders about a person who voluntarily comes back to the United States and receives a life sentence, the only one in fact which has been given under our air piracy law. I note at least two instances of extradition (and I may say, parenthetically, that the statistics on hijacking are very strange and relatively unreliable) in which hijackers were returned and subsequently tried. Extradition has been denied in 13 cases that I know of. What is interesting to me is that a state does not, of course, have to extradite. There are other ways of securing custody of the accused. Thus resort can be had to "disguised extradition" and, in at least 21 cases involving some 31 persons, hijackers have been informally returned and subsequently prosecuted in the country whence they had taken their departure in the original hijacking. The United States has been the principal beneficiary here.

There is also the problem of tremendous variations in sentencing, depending apparently upon plea bargaining. Thus in one case a person who hijacked a plane with 148 people on board received a two-year sentence for interfering with the crew. In the same jurisdiction a person who hijacked a charter plane with one person on board, namely, the pilot, got twenty years. The United States' record to date contains one sentence of life imprisonment, one of fifty years, one of 25 years, and three of twenty years; thereafter there is a variation from twenty years to one year on kidnaping, as well as the two years on a charge of interfering with the crew. In the French case referred to by Professor Lowenfeld, the two gentlemen received sentences of eight months and five months, respectively, for annoying the passengers. We have also had acquittals in this country, on grounds of temporary insanity in one case, and in another case a conspiracy charge was dropped. There have been several cases where persons have been found incompetent to stand trial and have been committed for psychiatric treatment. I am troubled by our sentenc-

ing, which is often severe and completely unrealistic in some instances. The variations in foreign sentencing are also unpredictable. Again, it is difficult to get any reliable statistical data on this aspect of the subject, but reports indicate that most sentences run from eight months to eight years in hijacking cases. There have been at least five acquittals where homicides were committed by the hijackers. There have been several death sentences and one of life imprisonment.

With respect to the political offense factor, one can observe a growing jaundiced attitude on the part of many states to the use of the political offense as a defense to a crime. This reaction is reflected in the current attitude toward terrorists. It first surfaced in the Belgian *attentat* clause, which was typical of nineteenth-century extradition treaties. Then, there was the condemnation of terrorism in the proposed Terrorism Convention of the League of Nations in 1937. And now there is the new Organization of American States' Draft Convention to Prevent and Punish Acts of Terrorism, as well as the widespread reaction against hijackers. Even states which have "played along" with hijacking, notably, some of the Arab states, have made strong denunciations of hijacking since the great episode of last September. Cuba, as has been previously mentioned, has also expressed opposition. There is a growing feeling that this kind of offense cannot really be written off as a political offense.

I am interested in a development in three European countries, West Germany, Denmark and Austria, in which hijackers have been punished, but apparently with the understanding that they will not be returned to the country from which they came. They have received asylum, but they have also received punishment for the criminal act, *e.g.*, theft of the plane, jeopardizing the lives of the passengers, illegal possession of weapons, and so on. I think that this is an important development, and it goes beyond hijacking into other phases of extradition. This is an alternative to extradition which meets the problem of the political defense. With regard to the matter of having mandatory extradition, I do not see how you can have universal mandatory extradition in the near future. It would be a "good thing" and better than the alternative of "disguised extradition." But perhaps at present disguised extradition is the only way if the asylum state does not choose to prosecute or the political defense is in prospect. You push the culprit across the border or otherwise get him back and then, under the *Ker* rule, which seems to be rather universally accepted, you do not inquire into the methods employed to obtain custody.

One should be optimistic about the Tokyo and Hague Conventions. They are good because they reflect a development toward a broader appreciation of state responsibility for the enforcement of international criminal law generally; their thrust, in the larger sense, is well beyond hijacking. So the offense of aircraft hijacking has become a kind of catalyst. It is a shocking, striking, dramatic kind of offense which goads nations into recognizing their common responsibility. If only in this respect, these conventions are significant.



The CHAIRMAN invited questions from the floor

Professor VISHWANATH MORE noted that the members of the panel had highlighted the limitations of the Hague Convention of 1970 and that a point which had emerged was that non-signatory states should also be bound by the provisions. However, this convention, like most others, contains a clause which permits even signatory states to withdraw easily from their obligations. Consequently, would not the suggested extension of the convention to non-signatory states be superfluous? Professor MORE also commented that there is much contradiction inherent in the convention. It is a multilateral instrument but is based on the traditional bilateral concept of extradition. Professor MORE asked the members of the panel to comment on this and other contradictions in the convention.

In response to the first point, Professor LOWENFELD pointed out that the withdrawal clause, Article 14 of the 1970 Hague Convention, applies to members. It has nothing to do with the sanctions convention analyzed by Mr. Malmberg. The sanctions are not automatic: there is to be consultation and probably an opportunity for a hearing at some point. If the sanctions convention itself has a similar easy withdrawal clause, *i.e.*, denunciation on X months' notice, the effect will only be that it will fall apart if a certain number of states withdraw. Similarly, if a coffee-exporting country withdraws from the International Coffee Agreement, it will be precluded from selling coffee to importing member countries. This is an inducement, and it undercuts somewhat the ease of withdrawing. But there is no inconsistency.

After agreeing with Professor Lowenfeld on this point, Mr. MALMBORG added that the Hague and Tokyo Conventions contain two types of obligations. One of these is declaratory of existing international law and, consequently, withdrawal would be irrelevant. The other type comprises obligations which are much more specific and contractual in nature. For example, there is the obligation to amend bilateral extradition treaties to make hijacking an extraditable offense. It is obvious that with respect to this type of obligation withdrawal might very well be important.

Professor CARL CHRISTOL asked the members of the Panel if, during the negotiations at the past two conferences, a distinction had been drawn between privately-owned and publicly-owned aircraft.

Mr. MALMBORG replied that there is no distinction based on ownership. In line with the Chicago Convention, there is a distinction between state aircraft, which are excepted from all of these conventions, and all other aircraft. But this distinction is based on the use of the aircraft, not its ownership.

Mr. GARY N. HORLICK of Yale Law School asked to what extent hijacking might lead to development of an international criminal law, with particular reference to the issue of hijacking, to an area not under the effective control of any state.

In reply, Professor LISSITZYN pointed out that under traditional customary international law a state must use due diligence in performing certain international obligations. The obligation of a state to protect the persons and property of foreign nationals within its territory is particularly applica-

ble in this situation. The question of what constitutes due diligence is one of fact, and it is difficult to determine whether the Government of Jordan conformed in the situation on Labor Day, 1970. His impression is that the Jordanian Government did not really have the power to comply with the requirements of international law as far as hijackers and persons or property hijacked were concerned. If this impression is correct, then the standard of due diligence was probably met by the Jordan Government. The other entities referred to in the question are not recognized states and perhaps not even recognized belligerents. However, even if they were recognized belligerents, the acts that occurred violated the laws of war.

The CHAIRMAN noted that some of the actors in the Jordanian situation have claimed to be irregular ("privileged") combatants, and to have the protection of that status in international law.

With respect to the issue of whether hijacking is an international crime, Professor LOWENFELD said that Mr. Malmberg's message appeared to be that with enough conventions and enough countries adhering to them, hijacking will begin to attain the status of piracy. By analogy, hijacking would then constitute a crime against the law of nations. But a difficulty in drawing the analogy arises from the relationship between the act of seizing an aircraft and the acts of political flight, search for asylum and protest.

Mr. EDWARD G. LEE of the Canadian Department of External Affairs mentioned that Canada and Cuba are currently negotiating a bilateral hijacking agreement. If the negotiations are successful, this will be the first bilateral hijacking agreement. One of the considerations relates to the inclusion of the hijacking of ships, as well as of aircraft, in the Cuban law of hijacking. Mr. Lee asked the panel members whether they have considered the issue of treating the hijacking of ships in the same way as hijacking of aircraft or the practicability of having an agreement that would deal with both.

Professor LOWENFELD pointed out that the United States has regularly returned ships. The occupants of the ships who wanted to stay were, however, usually not forced to return. Problems arose when these vessels were attached by claimants, on the basis of contractual rights or as a result of expropriation, who regarded these vessels to be the property of the Cuban Government. In one case in 1961 a simultaneous return was made of an American aircraft, which was in Havana not of its free will, and a Cuban ship which had landed in Norfolk harbor under the command of a mutinous crew.

Professor LISSITZYN commented that if Cuba proposes a bilateral extradition agreement including ships as well as aircraft, the real purpose of it would be to prevent Cubans from leaving the country, including those who do so for human rights reasons. Therefore Professor LISSITZYN would oppose a United States-Cuban agreement which concerns all cases without exception and provides for extradition without exception.

Professor EVANS noted that this question becomes troublesome when viewed in terms of the United States and the political defense. Every extradition treaty with a political defense written into it is subject to

interpretation by the foreign office, and the human rights criterion may not always be taken into consideration.

Professor LISSITZYN commented further that, in the light of recent events, the old concept of a political offense exception in an extradition treaty is beginning to give way to a different concept. The new concept is based, not on any strictly defined political offense foundation, but rather on a consideration of human rights. States should be free to refuse extradition, whether open or disguised, in situations where extradition would be gravely violative of the human rights of the person sought to be extradited. While the old concept may not be completely out of the picture, hijacking is not the proper area of law in which to apply it. The proper concept in this area is the new human rights concept.

Dr. IGNAZ SEIDL-HOHENVELDERN of the University of Cologne pointed out that the human rights of the hijacked passengers should also be considered because of the dangers to which they are exposed. The human rights criterion, therefore, has a double edge.

Professor LISSITZYN responded by noting that he did not suggest that all hijackers should not be returned or punished. The balance enters in postulating the question: To whom will the hijacker be returned? In cases of hijacking for "travel" purposes, statistics indicate that there is no great danger to passengers. On the other hand, in many cases the hijacker will on return be denied due process; and, consequently, his human rights will be endangered.

After noting that in certain circumstances extradition would violate the European Convention on Human Rights and thus could not be agreed to by many important signatories of the Hague Convention, Professor THOMAS BUERGENTHAL inquired whether greater use could not have been made of the Chicago Convention, its Annexes and compulsory arbitration clause to elucidate the legal principles applicable to governmentally sanctioned acts of air piracy.

Mr. MALMBORG said that some consideration was given to this matter and that the Chicago Annex idea might be revived. The United States has also advocated the balancing concept, but has preferred to emphasize the protection of the human rights of passengers.

Professor EVANS commented that the discussion has contained no reference to revival of the concept of international or regional criminal courts in which such offenders as hijackers could be prosecuted.

FROM THE FLOOR. A possible United States-Cuba bilateral agreement might not be helpful in view of Cuba's failure to honor its extradition treaty with Mexico. In a hijacking case Cuba refused to extradite a hijacker who was not of Mexican nationality but was on a Mexican aircraft. Cuba has also voted against a General Assembly resolution condemning hijacking. Thus, has Cuba been enthusiastic to punish when it was the state of landing but not otherwise?

Professor LOWENFELD replied that so long as it is not too difficult for people to get out of Cuba, then there would not be any objection to a bilateral agreement with Cuba for return of hijackers.

Mr. LARMAN C. WILSON asked Professor McWhinney why the term "piracy" is employed instead of "hijacking" in the title of a forthcoming volume edited by him.

In response Professor McWHINNEY stated that the usage was due to semantic reasons which stemmed from Canada's bilingual (French and English) character, the volume referred to being the product of an international conference held in Canada recently. The term "hijacking" is, in this regard, literally untranslatable into French, where it must be rendered either (rather inelegantly) as *détournement illicite*, or else, more generally and more popularly, as *piraterie aérienne*. Of course, the traditional common law or customary international law concept of *piracy* has certain limitations when applied to hijacking of aircraft; although when used in a strictly popular sense—and this is the sense employed in the volume referred to—the term "piracy" is broad enough to cover hijacking.

Mr. ALLAN MENDELSON advanced a hypothetical problem. If fifteen Jews escape from the Soviet Union on an aircraft with no other passengers, and with the pilot's consent, should these people be extradited or even punished?

Mr. MALMBORG said that there would be no obligation to prosecute under the Hague Convention if the pilot consents. Otherwise, these hypothetical hijackers would be subject probably to prosecution rather than extradition, and sentencing could be flexible and consider the equities of the case.

Professor EVANS agreed with Mr. Malmberg's analysis.

Professor LISSITZYN noted that the balancing process would take care of this problem, with the result that the punishment might be only symbolic.

Professor LOWENFELD expressed agreement with the possibility of symbolic punishment in this situation, but pointed out that the United States provides for harsh punishment under its statute.\*

Professor EVANS agreed on this point, but argued that where a crime has been perpetrated the punishment should be more than symbolic.

Mr. UGGI ENGEL asked if the punishment measures in the new sanctions convention are only for states which have ratified it or if they are directed against all states. Failure to provide for the latter type of application, he commented, would detract from the customary nature of the old law.

Mr. MALMBORG replied that the United States-Canada proposal he had described would not restrict the punishment measures to states parties to the convention or existing conventions.

Mr. RAYMOND O. WARD asked what effect the conventions would have on existing bilateral agreements between signatories. Are they to be considered apart from these treaties, not subject to the traditional substantive and procedural safeguards, *i.e.*, non-extradition of nationals, political offense exception, *non bis in idem*, etc., or merely adding a new offense to

\* Federal Aviation Act, Sec. 902 (i), 49 U.S.C. Sec. 1472 (i). The alternatives are death or imprisonment for 20 years.

the bilateral list, thus maintaining the defenses to the accused while keeping intact the retroactive application, if provided, of the bilateral treaty?

Professor LOWENFELD responded that the procedural safeguards provided in a particular bilateral agreement, such as protection against double jeopardy, would still apply.

Professor CHRISTOL noted that Professor Lissitzyn's balancing process should also take into account the problems falling under the heading of political asylum.

Professor LISSITZYN replied that the balancing process has taken place, since the new convention does not provide for mandatory extradition. It is not only for the Department of State to do the balancing; the Senate has to give advice and consent, and it might not advise and consent if mandatory extradition applied in all cases. The balancing process would have to be undertaken by the competent authorities in each state.

Professor EVANS commented that political asylum is now being limited in the thinking of states; states are demonstrating more caution in granting it. Moreover, states are not consistent in their policy with respect to political asylum. Professor EVANS expressed concern about the movement toward granting asylum and then proceeding to prosecute which is a departure from traditional state practice in regard to the grant of political asylum.

Dr. FRANCISZEK PRZETACZNIK noted that the principles concerning the granting of asylum, *inter alia*, are contained in the United Nations Declaration on Territorial Asylum of 1967 and in the various inter-American Conventions on Asylum. The said Declaration, *inter alia*, stipulates who is entitled to grant political asylum, to whom, and for what reasons. In addition, the International Court of Justice, in the *Haya de la Torre* case, delivered two Judgments in 1949 and in 1950, in which it dealt at length with the principles on the granting of asylum. Its views in this respect should be taken into account.

The session was thereupon adjourned.

#### ROUND TABLE: The Social Scientist Looks at the International Law of Conflict Management

The session convened at 2:15 o'clock p.m. in the Pan American Room of the Statler-Hilton Hotel. Inis L. Claude, Jr., Edward R. Stettinius, Jr., Professor of Government and Foreign Affairs at the University of Virginia, presided.

The CHAIRMAN stated that the purpose of this round-table discussion was to consider how the social scientist approaches the question of conflict management. He suggested that in the past it has been traditional to look at either the legal or the procedural aspects of conflict management problems. Social scientists, however, have tended to bring different approaches and views to their study of these problems. They look at the law as it relates to the broad range of social sciences. Political and legal

realms are often considered together. There is no underlying assumption that the law of conflict management provides the whole picture of the field of conflict management problems. The social scientist may believe that the rôle of law must be combined with other factors for a more realistic appraisal.

Professor CLAUDE indicated that no formal papers would be presented, as this was to be an open discussion over a wide-ranging area of topics common to the subject. He introduced the participants, Louis Henkin, Michael Barkun, Richard A. Falk and Linda B. Miller, and noted that each of them has published work relating to the subject. He asked Professor Henkin to begin.

Professor LOUIS HENKIN was not sure whether he was expected to assume to be a social scientist and look at the law of conflict management, or, as a lawyer, to look at how social scientists look at that law. The law in the subject is also ambiguous, since lawyers have sometimes looked at all law as conflict management; but he assumed the subject is law used to keep international conflict manageable, *e.g.*, the law of the U.N. Charter outlawing war, disarmament treaties, and institutional laws and procedures for peacekeeping and peacemaking.

The social scientist, he suggested, does not look at any law very much or very hard, either in his theories of international relations or in his teaching, and not looking, of course, is a significant kind of looking. International law is taught but in isolation, as something technical at best, and not real, relevant, and material. Political scientists do not often ask where and how law fits in national policy-making or in international diplomacy, how it compares with other means in the international system: Why is law made? What law is made? Why is this the law made and not other law? What functions does law serve? What effects does it have? What preserves, changes, or destroys law? What are the forces that induce or discourage compliance with law?

This is true of law in general and even more true of the law of conflict management. There have been few studies asking questions like those mentioned about the U.N. Charter or disarmament treaties or even about the United Nations and regional organizations. Should there be law against war and other uses of force? Can there be any such law? Is there, for example, an effective norm against war today? Does it substantially reflect viable international mores or "morality"? How much difference, what kinds of difference, does such law make? Does it deter, channel, mold policy relating to conflict? Does it help manage them or make them more manageable? How do norms compare with institutions in their effect on national behavior? Are the answers the same or different as regards traditional international conflict or international and competing interventions in internal wars?

The social scientist, he concluded, tends to be cynical about law. But cynicism is not scientific. He ought to begin to study and learn and teach the part of law in international politics, to determine the questions to be asked and to develop methods for seeking answers to them. The Cuban

missile crisis, for example, has been much reported by lawyers and non-lawyers, and there has been some discussion even of the rôle of law in the process that led to policy. But no one has even tried to formulate that question scientifically, to suggest how it might be investigated or even why it should not or need not or cannot be studied.

Professor CLAUDE commented that he used Henkin's *How Nations Behave* and that his students were generally unconvinced that law made any difference. However, no one devised a study to refute Henkin's assertions. He asked Professor Barkun to continue the discussion.

Professor BARKUN commented that he had been considering the question for some time and had brought along some notes and comments which he would like to present for consideration:

Four questions seem to me of primary importance in viewing the international law of conflict management from the standpoint of social science.

First: How do we distinguish between legal ritual and behavioral change? Because law in our society has always been uncommonly ritualistic, it is difficult for us to adequately judge the extent and purpose of the ritual. We can, like Jerome Frank, dismiss it as atavistic. Or we can, as so many did before and after him, mistake ritualistic activities as automatically potent and self-enforcing. Obviously, neither stance proves completely satisfactory. The need for ritual, particularly as a means for dealing with group conflicts and anxieties, is far too deeply rooted to ignore or try to eliminate. By the same token rituals often have purposes of which the participants themselves are not aware. In international law, where problems of efficacy are so often raised, we need to know far more than we now do about the extent and purpose of ritual. Actual activities are those which instill a feeling of common enterprise and articulate common values in an emotionally forceful manner. As such, they demand our attention, but for what they are, not as acts which in and of themselves alter the environment. So far as international law is concerned, diplomatic conduct and the workings of international organizations are particularly in need of such clarification. Since we are prone as it is to take acts at their face value, we impute consequences to them which they may be quite unable to produce, whether they are treaty-signings, negotiations or court decisions. That does not mean they are without purpose, only that the manifest and latent functions may differ.

Second: To what extent is international law the product of human intention? That we wish it to be so does not, alas, answer the question. We have become habituated to the belief that legal systems are products of human will and as such serve as valuable tools for the conscious attainment of stated ends. That is, of course, often the case, though I must add parenthetically that we may even overstate its occurrence within our own society. In any event, whatever the legislative capabilities of national and sub-national governments, these capabilities are sadly lacking in international relations. We cannot at the moment choose the rules to effectively regulate large and significant areas of international conflicts. Let me suggest that in the matter of law, too, nature abhors a vacuum.

The absence of law by intention does not necessarily negate the possibility of law by unconscious accretion. I am not here limiting non-intentional law solely to customary law, as customary law has been defined in international legal treatises. At the risk of incurring a substantial amount of misunderstanding, I want to suggest that, at least from the standpoint of social science, usual tests of customary legal validity may be insufficient. They may be insufficient, that is, as complete indicators of patterned international behavior. However repugnant this notion may be in terms of formal criteria of validity, it is at least worth exploring the possibility that patterned behavior—all patterned behavior—has a function in guiding future conduct. The patterns may only later or perhaps not at all find expression in customary or treaty law. Yet their effectiveness may be unimpaired. Unfortunately, spontaneously evolving patterns of behavior are as likely to contain morally repugnant norms as desirable norms.

Third: How dependent is international law upon prior cultural uniformity? As Adda Bozeman has recently pointed out, international law, if we speak of it as a unitary phenomenon, must coexist with many legal cultures, some quite divergent from its own presuppositions. There are distinctions not only between broad culture areas, but between different kinds of elites as well. Diplomats and scientists necessarily function professionally in contexts largely determined by separate professional cultures, whatever their cultures of birth and national affiliations. We must determine whether we are on the road towards greater cultural convergence, greater cultural multiplicity, or are to stay at the position of mixed tendencies where we presently find ourselves. To the extent that third parties themselves share a common professional culture, we must as well determine whether this constitutes a source of harmony or conflict. The international legal culture is real and cuts significantly across many other cultural differences. However, it may be of limited utility if the ideas generated within it are not shared by the parties to international conflict situations.

Fourth: What is the rôle of law in international crises? We are all drawn toward crisis situations for a variety of reasons: They are inherently dramatic, the values at stake in them are great, and the information concerning them is widely disseminated. They constitute only a very small proportion of total international interactions and of total international legal relationships. Nonetheless, for these reasons and perhaps for others as well, they have had claim upon a disproportionate amount of our attention and research resources. Undramatic, everyday conflicts lacking in obvious glamour or historical significance have had to make do with what is left. This division of labor may not be worth maintaining. In the first place, a crisis seems to me far more a point of legal failure than one where the resources of law must be brought to bear. Either because it falls outside of existing rules or because existing legal practices seem unable to resolve the problem involved, a crisis seems the worst place to attempt meaningful legal research, unless of course one is engaged in an autopsy to see why matters reached the state they did. Second, the



population of crises is so very much smaller than that of all other law-related events, that we would surely come out with far more reliable knowledge by painstakingly examining the routine than by multiplying case studies of the dramatic. In any event, drama is in the eye of the beholder and one of the saving graces of the social sciences is that they do have the ability of rendering very dull things highly interesting—despite the feeling in some quarters that the reverse is true. Law-in-action is never as satisfactorily viewed from the top as from the bottom. We learn far more about American law by riding around in police cars than by listening to oral arguments before the Supreme Court. And it is an equally good bet that we would profit more by examining the day-to-day functioning of an embassy, law firm, or foreign ministry than by expending the same energies on a critical Security Council debate or on World Court litigation.

Naturally, there is little way of knowing at this time the likely productivity of the priorities I have just outlined. Nor, I should add, need there be any necessary congruence between the interests of social scientists and the needs of government officials and legal practitioners. However, if the study of the American legal system offers any comparable evidence, research has proved productive to the extent that researchers have disengaged themselves from the Supreme Court and from court opinions. Without wishing to press an often spurious analogy between international and municipal law, I would expect much the same relationship to hold in international law. Behavioral generalizations emerge more frequently and more fruitfully from the commonplace and routine than from the rare and dramatic.

Professor FALK believed that the place of social scientists in the legal realm is often understated. We are living in a period of world order transition during which international lawyers have either not seen or been slow to see the change. Therefore there is a need for the social scientist to point out the change. There is, of course, a difference in the approach to their respective intellectual pursuits. International lawyers have also been slow at developing a comprehensive world order system and encouraging study of it. Future evolution and legal contributions to a system are largely ignored. Traditional methodologies and ideologies do not explain differences that are occurring in the system. It is necessary to concretize these differences and to clarify positive and negative sides of law in relationship to international problems.

It is difficult to come to terms with lawyers' language. There is a gap between behavior and perception and, as a result, utopian potentiality or irrelevance have been the end products. In addition, we have not seen foreign policy processes as a place for the contribution of law nor have we considered the actual effect of law on the decision. Norms and institutions have become so generalized that the place and relevance of international lawmaking is lost.

The Cuban missile crisis is an atypical case. The decision to bomb North Viet-Nam in 1965 is more usual. Normative considerations were

irrelevant in the latter instance. Law had nothing to do with the policy decision itself but was used to explain the action. Cambodia is an example of an instance in which a powerful country's rationalization of conduct was the use of law. The Cuban crisis is a good illustration of the limited use of law at one point in the process. Thus we are left with the dilemma of whether law is to be used as a mechanism for guidance or a rationalization of action.

In world order transition, the state system is increasingly unable to deal with the problems of international society. A means must be found to come to terms with social changes and their relationship to world order changes. The labor distribution between social scientists and lawyers is not important here, since the task of depicting the world order system is a unitary function. It is necessary to orient inquiry toward desirable world order ends. Since we are living in a condition of civil emergency, the problem of social relevance and its effect upon world order transition is worthy of consideration, especially by social scientists.

Professor MILLER offered a few general comments on the round-table subject. She argued that social scientists are examining aspects of world order, including restraints upon state sovereignty that are developing as global interdependence increases. She noted that social scientists are also concerned with the conflicts that arise from the destabilizing effects of interdependence. She expressed the hope that lawyers would soon contribute their insights on these issues. Professor MILLER cited the revived interest in the study of racial problems and civil strife as they affect world order, an interest shared by lawyers and social scientists.

In response to Professor Henkin's remarks, Professor MILLER stated that law is more widely studied today in political science departments than formerly. Yet the reciprocal study of political processes lags behind in law schools. Both social scientists and lawyers should devote more attention to analyzing the accommodation of tensions and the resolution of conflicts if a world order outlook is to be developed and strengthened.

Professor MILLER agreed with Professor Barkun that there has been too much focus upon crisis situations to the detriment of day-to-day international transactions.

Professor CLAUDE suggested that each participant might have a few remarks to make in rebuttal.

Professor HENKIN appreciated Professor Barkun's stress upon the importance of the routine, though what is the international equivalent of "police-car law" is not obvious. In conflict management, too, there is much routine, whether in contingency planning, deterrence, indeed whenever law works "preventively." He agreed too that law is different in crisis from what it is in the routine. But he did not agree that law in crisis is not worth studying: that view tends to reflect the conclusion that law does not matter in crisis and he thinks it does, and he would like the social scientists to help him prove it instead of acting as though it has been proven that law does not matter.

He did not agree either with the suggestions that generally international law depends on cultural uniformity. In fact it is true of very little of international law, say, that governing expropriation of alien property, and the differences as to that law, too, reflect principally economic rather than cultural divergence, and reciprocal interests may yet hammer out a viable law there also. (Differences as to the law of treaty succession are temporary, and also not cultural.) Most of international law deals with the routine—territorial and national sovereignty and status, diplomatic privileges, nationality, property, tort, contract—and as to these the developing countries largely have the same interests, and desire and accept the same law as the developed countries. Of course, the developing countries would like some additional new law, *e.g.*, new law of trade or a new regime for the seabed, and agreement on some new law will come regardless of the cultural diversity.

As to the law of conflict management in particular, the new countries are as eager as the old to have whatever protection law and institutions give them against aggression. Perhaps some would like to see the law interpreted to permit the use of force against the remnants of racism and colonialism in Black Africa but that would be special and large hypothetical exception and hopefully one that will waste away.

Professor HENKIN was not as optimistic as was Professor Falk that we are witnessing a "world order in transition." He shared Falk's world order focus and he agreed that studies like Clark-Sohn and Falk-Mendlovitz were important because they highlight problems and explore "solutions," even if those they seem to prefer are not realistic or acceptable to many. On the other hand, he was less pessimistic than Professor Falk about the uses and abuses of law. It deters daily and guides action in other ways. Even when law is used to rationalize or justify it also works back to shape policy, for the fact that action will have to be justified under international law has to be taken into account in the process of decision, and available alternative justifications help shape the decision, as in the Cuban missile crisis.

In reply to Professor Miller, Professor HENKIN agreed that international law was studied, even required, but it was taught in a vacuum, isolated from international politics.

Professor BARKUN stated that he did not mean to suggest that crisis situations are not worthy of study, but he does feel that they are less worthy. Paradoxically, they may be more difficult to study. Bozeman is impressed by the fact that the early elites were trained in other countries. There has been a remarkable incorporation of international law due to these elites which will eventually die out.

Professor FALK urged that conflict management law should be approached through studies of world order and social change. It may not be possible to find a general theory of society and social change. The lawyer does not agree with this approach. Further, we have not used historical data as we should. This situation has not been helped by historians who write national histories rather than comparative works.

Professor CLAUDE asked if Professor Falk would clarify the idea of world order transition by explaining whether he meant it to imply that we are moving toward more stable order or toward greater disarray.

Professor FALK replied that he meant to be pessimistic about the future. The conditions for transition are going on outside of the system. The present world order system cannot cope with problems unless the domestic orders are transformed, *e.g.*, the conservation and environmental perspectives. Nation-states are the prime problem. The second most important problem is American society. Comparative understanding is essentially required and inquiry must be made. If the dominant aim is to understand the international system, then we must choose between responses to a social or political problem and efforts to evolve a better theory of international law.

Professor MILLER wondered what criteria would be used to decide whether a problem was routine or crisis and how to classify changes in the economic plans of governments, given the growing interdependence of modern states.

Professor HENKIN suggested that these are not fixed and exclusive categories. In general, a crisis endangers friendly relations and even peace, but crisis can grow out of routine when routine breaks down. The job for international society is, by law and other means, to make and keep as much as possible routine. Economic planning and change in planning are in one sense routine but they can create crisis if they have harsh consequences for others. Poverty, generally, is a routine, daily problem with crisis consequences. In any event, the distinction suggested was between law in routine and law in crisis and there is yet little international law as regards national planning or poverty.

Professor CLAUDE asked for questions from the audience.

Mr. OSCAR SCHACHTER was disappointed that little had been said about the theme of the Panel, namely, the approach of the social scientist. He saw this approach primarily in terms of obtaining reliable knowledge. It was not enough to gather impressions on such questions as "How much difference does law make?". It was necessary to develop techniques for obtaining the relevant facts and, if possible, to get quantified answers to that and other leading questions. This was the task of social science, as indicated for example in Karl Deutsch's admirable presidential address to the American Political Science Association on new concepts and methods. One may agree with a demand for social change but it is still essential to have methods for testing our assumptions and our guesses about what people want, how they behave and so on. While social science may not at present provide the answers, should we not at least consider how they have gone about this task; whether, for example, their surveys and data banks can give us hard facts that are relevant; whether their new concepts of comparative political analysis or of simulation or content analysis and so on can be usefully applied to our subject? International lawyers have only barely touched this area and much more must be done in the effort to achieve more reliable knowledge.

Professor CLAUDE commented that social scientists had been given a pep talk on the need for work and suggested that two questions were pertinent. What kind of difference law makes is one question, and how much difference it makes is another. Statesmen may worry about legal restraints as devices for keeping them from doing what they feel they should or must do. Qualitative and quantitative criteria are needed.

Professor FALK basically agreed with Mr. Schachter but thought that data use might be one item employed by social scientists but should not be used exclusively.

Professor ELLEN FREY-WOUTERS asked Professor Henkin if it was true that the developing countries were satisfied with the existing international legal and political order. Various developments in the 1960's and 1970's indicate that many of these countries are living in an overt or covert imperial-satellite relationship. Continued dependence on the industrialized countries acts as a serious constraint on united and effective national action. This may satisfy some of the existing pro-Western establishments in the developing countries. But everywhere in the "Third World" demands for radical international systemic change as the sole solution to emancipate the developing countries from foreign control grow stronger.

Professor HENKIN agreed that the third world was not happy and that international law ought to be developed that will promote its happiness. But the making of new law is, at bottom, a political, not a legal, enterprise. International law today reflects that international society has been prepared to accept only "watchdog" principles—"let's leave each other alone." Under pressure and example from national societies, the welfare principle is finally on the international horizon, but we are far from having it accepted in international society. The developing countries themselves have not shown a shining example. They have not handled their own revolutions very well. In their relations with others, even with other developing countries, co-operation and sharing have not often prevailed and when some of them find wealth they do not find virtue and altruism. One area of great promise for the welfare principle and for the third world itself—the wealth of the seabed—is being tragically bungled as a few developing and particularly radical states grab for themselves, encouraging the developed to do likewise, and leaving nothing for the heritage of the rest of mankind.

Mr. ARNOLD FRALEIGH wondered if social scientists had contributed toward the formulation of Article 2(4) of the United Nations Charter or decolonization plans.

Professor CLAUDE called upon Leland Goodrich to answer the question.

Professor GOODRICH stated that the law is generally expressed in the Charter and treaties and appears to be quite adequate until a crisis appears. Social scientists, as such, have not contributed directly to the items mentioned in Mr. Fraleigh's question. However, lawyers involved in the plans for the Charter certainly had knowledge of the international system. In recent times, the real problem has been that small and large states have become equally resistant to law.

Professor BURNS H. WESTON mentioned that everyone does not have a uniform understanding about what is meant by law. The McDougal approach to legal study emphasizes the relationship between decisions and policy. The social scientist and many lawyers tend to think that lawyers think only of norms while, in truth, the lawyer must think of policy. The social scientist concerns himself with the policy-oriented decisions. Policy thinking, as described by Falk, is important for both social scientists and lawyers.

Mr. R. P. ANAND said that cultural differences between the Afro-Asian countries and Western Christian states had been unnecessarily exaggerated by scholars like F. S. C. Northrop and the late Quincy Wright. He agreed with Professor Henkin that cultural diversity was not the basis for non-acceptance of international law. While the present legal system was generally accepted, some rules were challenged and rejected because they were contrary to the national interests of the new states.

A speaker believed that national survey techniques are important to law since law does have a place in the foreign policy process. Younger, more aggressive lawyers tend to intrude into the process but legal advisers are generally not too kind toward these people. Decision-makers do not read too much in the legal area. However, the State Department has been receptive to survey research projects. Perhaps a way can be found to mix these elements.

Mr. BENJAMIN B. FERENCZ would like to see a little more attention given by social scientists to peace and the development of a constructive approach to conflict management.

Professor FALK agreed. The important task is to reshape the political education process that takes place in the societies of the world. In the vision of a world order system, cultural diversity may be quite relevant in determining whether consensus can be found or created.

Professor BARKUN felt that major developments along this line will be taking place in Western Europe within the next few years. The attitudes toward European integration implanted during the fifties may carry on.

Mr. ANDREW GREEN wondered if law has not been eliminated when it comes to equal consent. What happens to people who do not go along?

A speaker indicated that many lawyers view law as a purist subject and reject the place of the political scientist in it. However, the example of South West Africa reminds us that the problem should have been solved instead of rejected on technical grounds. Certain problems cannot be solved by the courts alone but require political means.

Professor ERIC STEIN agreed that international lawyers that are not thoroughly trained tend to ignore the results attained by political scientists. Arms control and European integration are two cases in point. There is a treasury of data available on the subject of arms control but few analytical articles place the legal factor in a broad enough context. In order to evaluate legal and institutional aspects of integration it is necessary to look at the process and especially the dynamic relationship between national and transnational institutions. The lawyer is remiss in not looking to the social scientist for valuable techniques.

Professor CORNELIUS F. MURPHY was concerned about bridging the two fields and believed that diplomacy might provide the method. Lawyers and social scientists tend to look to different bases. The interchange between those concerned with obligation (lawyer) and consent (social scientist) could be very valuable. The basic problem in conflict management may be that the degrees of friendship and animosity are not quantitatively measurable. Real work remains to be done to develop imaginative ways of adaptation to a transitional world.

Professor HENKIN indicated that he was looking forward to studies of the type suggested by the audience. He hoped that they would examine also the various assumptions about the import of cultural differences or revolutionary ferment for existing law, especially for Article 2(4). The assumption is made all too often and without basis that that law does not work and will work even less in future, and that is a tragedy for the law of conflict management.

Professor BARKUN commented that many social scientists who do work on international law subjects have not come forward with legal contributions that are implicit in their work. It has become the task of the international lawyers to seek it out. It is necessary to examine quantitative sources which have much to offer.

Professor FALK noted that the discussion thus far had not stressed a sense of relevance for the historical past which he felt was vital. In the transitional world in which we are living, certain processes are challenging world order. It is necessary to depict these processes and then find strategies to deal with change.

Professor MILLER concluded that two problems seem critical. The first is that the definition of conflict is too narrow. The second is that social scientists and lawyers are equally reluctant to give up national perspectives.

Professor CLAUDE mentioned that characterization of crisis as the point where law cannot control is applicable not only to the international system but also to the national or domestic system. He concluded that we may attribute too little to international law because we expect too much of it.

The CHAIRMAN thanked the assembled group and the meeting thereupon adjourned.

### THIRD SESSION

Thursday, April 29, 1971, at 8:30 p.m.

#### Conflicting Approaches to the Control and Exploitation of the Oceans

(Jointly Sponsored with the American Branch of the International Law Association)

The session convened at 8:30 o'clock p.m. in the Congressional Room of the Statler-Hilton Hotel, Washington, D. C., Professor Myres S. McDougal presiding.

Chairman McDougal. Gentlemen, the first thing I must bring to your notice is that this session is jointly sponsored by the American Society of International Law and the American Branch of the International Law Association of which most of us are members and Mr. Cecil Olmstead is the long-time President. We are very proud that the American Branch has long ago recognized the importance of the subject of our panel and has produced a number of remarkable reports which a recent Senate subcommittee found persuasive.

The subject matter before us presents a varied set of problems and we have this evening a list of distinguished panelists to address themselves to these problems. It will be interesting to see how our panelists formulate the issues. If they do not formulate them in terms of common interests, I hope you from the audience will. And, if you do not, I assure you, before we conclude, I will.

The CHAIRMAN introduced the first speaker of the evening, Mr. John R. Stevenson, The Legal Adviser of the Department of State.

#### ADDRESS BY THE HONORABLE JOHN R. STEVENSON \*

Mr. CHAIRMAN, Ladies and Gentlemen:

It is both an honor and a challenge for me to address you tonight on the subject of conflicting approaches to the control and exploitation of the oceans. Since I assumed my duties at the Department of State, I have devoted a significant part of my time to the problem of identifying the reasons for these conflicting approaches, and attempting to reconcile them. I know that in the course of the last few years many of my colleagues in other governments have had the same experience, as I am sure my good friend Alan Beesley, the Canadian Legal Adviser, would confirm.

What we are all faced with is the most profound crisis in the law of the sea since the birth of the law of nations as we know it today. If 200-mile territorial seas were accepted world-wide, more than 25%—up to 50% according to the Soviet geographers—of our oceans would cease

\* The Legal Adviser, Department of State.



to be high seas and would become subject to the sovereignty of coastal states with other states enjoying only a right of innocent passage, and with no right to overfly, to fish or conduct scientific research, much less engage in mineral exploitation.

We know that the origins of today's law of the sea are an inextricable—indeed a dominant—part of the origins of modern international law itself. We also know that most of international law classically concerned sets of exceptions to the fundamental principle of territorial sovereignty: the basic source of most law on land was municipal, not international, law.

On the seas, this was reversed. Beyond a narrow strip of territorial sea, the basic source of law was international.

Thus the international lawyer must approach the law of the sea not only with a special affection born of history, but with a special concern for the future of international law itself. The current crisis in the law of the sea is in a certain sense a struggle for supremacy between municipal and international law. The outcome of that struggle will affect far more than nations' interests in the seas. It is part of a broader set of counter-currents: on the one hand, a more sweeping limitation on state sovereignty in the general interests of a more complex and interdependent international community; and, on the other hand, an increasing affirmation of nationalism, particularly economic nationalism, as the guiding force in international affairs.

We are all aware of the domestic manifestations in the United States of these different currents, although we frequently forget their full scope. Those who speak of limitations on state sovereignty are all too frequently regarded as being exclusively those who seek the immediate establishment of world government. To cite only a few examples to the contrary, it is well to remember that those who maintain that international law requires just compensation for expropriation of foreign investments, who argue for attempts to avoid double taxation, or who seek to limit the application of the Act of State doctrine by United States courts, are in a real sense speaking of effective limitations on state sovereignty.

The present crisis in the law of the sea may well constitute the critical test of whether international law is capable of adapting itself to deal responsibly with these counter-currents. In a certain sense, the task should be easy, for in the oceans we have inherited a legal system which has historically been international. In another sense, it is exceedingly difficult. We are not dealing with Antarctica or outer space, where only a few states have direct interests in most of the issues involved. Every state, even a landlocked state, has very important interests in many aspects of the law of the sea.

In order to gain a fuller understanding of the problems we face today, it is useful to examine where we have been.

Marine empires, in a literal sense, are well known in history. We know, for example, of Venice's claim to the Adriatic, of England's to the North Sea, and of Spain's and Portugal's attempts to divide the oceans between them. The modern law of the sea—based on the fundamental

premise of the freedom of the seas—emerged in the 17th century in defiance of such marine empires.

From its inception, the freedom of the seas doctrine raised practical problems of overriding importance: for a variety of reasons, it could not be applied up to the very coastline of a country. The compromise reached historically was the classic three-mile territorial sea. Within the three-mile limit, the coastal state was sovereign, subject to the right of innocent passage. Beyond three miles lay the free high seas.

The basic core of the law of the sea remained fairly stable for a long time. Considering the interests involved, the record of respect for the law of the sea shown by states in their international intercourse is particularly notable. Perhaps the most significant portent of things to come was the claim by Czarist Russia, in its waning days, of a 12-mile exclusive fisheries zone. The Soviet Government, soon after coming to power, converted this into a 12-mile territorial sea. Some other states followed suit. The dispute between advocates of the three-mile and the 12-mile limit frustrated all attempts in this century to reach agreement on the breadth of the territorial sea. Nevertheless, one can say that there was an overwhelming consensus that the seas beyond 12-miles were free high seas.

At the end of World War II, three unconnected events occurred that have had a critical effect on the recent development of the law of the sea. They were the Truman Proclamation on the Continental Shelf, the establishment of the United Nations, and the beginning of the final dismantling of the old colonial empires. Seen in context, the Truman Proclamation was the first attempt to modify the law of the sea in the light of new technological developments. The technology to exploit seabed minerals beyond the classic three-mile limit was developing. Such activities required permanent installations, the exclusion of competitors from given areas, and much detailed regulation. The law of the sea had not concerned itself with the seabeds apart from the question of laying submarine cables and pipelines. What precedent did exist seemed to suggest a special relationship between the coastal state and seabed resources beyond the three-mile limit. After consultations with other states, the United States in 1945 asserted its exclusive right to exploit the resources of the continental shelf off its coast. There were no protests from other states.

Quite to the contrary, the Truman Proclamation was quickly emulated by other states. Many of them made their claims more extensive, as for example, by claiming sovereignty over the waters above the continental shelf. It quickly became apparent that the example set by the Truman Proclamation was not generally understood as applying exclusively to seabed resources of the continental shelf, but rather in terms of the right of the coastal state to make unilateral claims. The most striking illustration is, of course, the 1952 Declaration of Santiago by Chile, Ecuador, and Peru. Those nations, largely without significant continental shelves off their coasts, claimed jurisdiction over the waters and seabeds to a distance of 200 miles from the coast. Since fisheries were of particular

concern to them, they argued that if the United States could claim seabed resources in its national interest, they could make similar claims in the waters in their national interest. They also argued that this was just compensation for the absence of a continental shelf off their coasts.

The second event I mentioned was the establishment of the United Nations. As we all know, the Charter of the United Nations contains provision for the codification and progressive development of international law. One of the earliest projects undertaken by the International Law Commission pursuant to this provision was the codification of the law of the sea. This was a monumental effort which led to the Geneva Conference on the Law of the Sea in 1958, where the four Conventions on the Law of the Sea were adopted. Eighty-four countries attended the Conference, including forty-six developing countries from Africa, Asia and Latin America.

However, the Conference was unable to agree on a maximum breadth for the territorial sea or exclusive fisheries jurisdiction. It was also unable to agree on a precise seaward limit for the continental shelf. At a further Conference in 1960 held for the purpose of agreeing on the breadth of the territorial sea, a U.S.-Canadian proposal for a six-mile territorial sea and an additional six-mile exclusive fisheries zone failed by one vote to achieve the necessary two-thirds majority.

The third event I mentioned involved the emergence of a large number of newly independent developing countries. These countries do not, by and large, have the indigenous technological capability to take full economic advantage of the seas. With no wide-ranging shipping or fishing fleets, they generally perceive little interest in the distant seas beyond the area off their own coasts. The fact that their trade, their communications, and indeed their very security may be dependent on the freedoms of the seas seems a remote consideration in the face of giant foreign tankers or fishing fleets off their coast. They read that there are vast untapped petroleum and mineral riches in the seabeds, and become increasingly concerned about being left out.

Among many developing countries throughout the world, there is apparently an abiding feeling that the existing law of the sea discriminates against developing countries. Their responses, however, even among those who participated in the 1958 Conference, are quite varied. Some Latin American states, particularly those with long coastlines facing vast and unobstructed reaches of the sea, argue that unilateral coastal state claims are the answer. Others argue that a truly international system, with equitable sharing of benefits, is the answer. Only now are most African and Asian states beginning to realize that you cannot accommodate both absolutes. An international system applicable beyond undetermined or excessively broad areas of coastal state jurisdiction would amount to little more than a formal and empty promise of equity.

The idea that every state may fix its national jurisdiction within reasonable limits is being put forth by its proponents as a panacea for developing countries. This is particularly unfortunate. Since any state

with good lawyers at its disposal can make out a reasonable argument for virtually any limit, the ultimate result would be unlimited extensions of national jurisdiction. If the oceans were then divided generally in accordance with existing equidistance principles—the so-called national lake theory—the major beneficiaries would be a few developed states and Latin American states.

Ambassador Pardo's list of 13 is already famous and bears repetition here. If the oceans were fully divided in accordance with equidistance principles, 13 countries would control approximately two thirds of the world's oceans (or approximately one half of the entire planet): they are Australia, Brazil, Canada, Chile, Ecuador, France, New Zealand, Norway, Portugal, South Africa, the U.S.S.R., the United Kingdom and the United States.

The result is obviously too absurd to be considered as any possible basis for agreement. Yet, in the absence of agreement, Ambassador Pardo, for one, believes this is the direction in which we will drift. There is, in addition, one important caveat. As Ambassador Pardo himself notes, important resistance to this result can be expected from major maritime states, some of whom are among the 13 lucky coastal states he lists. However, a point could conceivably be reached where the proposed limits of national jurisdiction are so far seaward, or so completely prejudice the maritime interests involved, that serious consideration would have to be given to other alternatives.

Here then is the logical end of the road begun by the Santiago Declaration of 1952, or as some allege, the Truman Proclamation of 1945. The picture is a very disheartening one. It is a picture of claims and conflict, bald assertions of national interest, and failure of governments to work together multilaterally for a stable and equitable law of the sea. For every interest a coastal state conceives, it can invent another limited jurisdiction or contiguous zone thesis; each time there is a longer list of precedents for another type of unilateral claim.

If the proponents of the reasonable limits thesis are leading us down a blind alley, so are the apologists for enforcement of their interpretation of existing law. They typically counsel "enforcement" of narrow territorial sea limits and navigational rights while simultaneously counseling a broad interpretation of the Continental Shelf Convention. In essence, they would have the United States assert coastal state rights to protect its particular coastal interests, and enforce them, and assert high seas rights to protect its high seas interests, and enforce them. This might work, and might even be reasonably equitable, if the coastal and high seas interests of all other states were the same. They are not. There is an excellent legal and logical answer, but no particularly appealing political or international negotiating answer to the question: Why can't we make claims off our coast in the waters that reflect our particular interests if the United States can make seabed claims off its coast that reflect its interests?

I am not at all suggesting that the existing Law of the Sea Conventions should be replaced. What I am suggesting is that they do not resolve critical questions regarding limits, do not deal adequately with more recently developed issues such as pollution control or an international regime for the seabeds beyond the limits of national jurisdiction; and in general do not provide the kind of equilibrium between coastal and international interests that is needed for a reasonable degree of stability. The conventions almost exclusively resolve every law of the sea issue by placing a matter completely within coastal state jurisdiction, or completely within flag state jurisdiction.

The possibilities for accommodation and co-operation within an international organizational framework were not fully developed at the time of the 1958 Geneva Conference. The great advantage of this type of framework is that it can provide a flexible basis for accommodating coastal and international interests with respect to the same types of activities and use of the same ocean space. It also affords a basis for giving coastal state interests the necessary protections without conferring exclusive benefits or sovereignty on the coastal state. It would allow some distribution of benefits on a basis other than geographical accident. Such a benefit distribution system would not only give landlocked states some share, but would operate as a sort of insurance policy for many developing coastal states. They would be sure of sharing in benefits whatever the size, nature or productivity of the areas off their own coast.

This is the underlying thesis of what I believe to be the most novel and the most promising aspect of the new United States Oceans Policy. It is a rejection, to the maximum extent feasible, of an absolute approach to jurisdiction, either in terms of comprehensive or limited jurisdiction. For seabed resources beyond the narrowest practicable limit of coastal state jurisdiction—a depth of 200 meters or a 12-mile territorial sea, whichever is further seaward—the President's policy rejects sovereign rights for the coastal state and also rejects a flag state free-for-all. He proposes instead an international regime with a strong administrative rôle for the coastal state in a Trusteeship Zone of substantial size beyond the limits of national jurisdiction.

The Trusteeship Zone is neither entirely international nor entirely coastal in nature. Whether or not one agrees with the particular balance struck in the draft convention submitted as a working document to the preparatory committee for the 1973 Conference is not of the greatest importance. This is largely a question that can be resolved pragmatically. The important issue is whether one is prepared to try to have the best of both systems.

On the international side, there would be, among other things, equitable sharing of benefits, certain minimum regulatory standards (to protect the marine environment, for example) and technical requirements, a central store of expertise and technical assistance upon which countries could draw, security of tenure, protection against expropriation, and peaceful and compulsory settlement of disputes. There would, moreover,

be a clear demonstration that nations can build common institutions to deal with their common problems—an objective which both the Secretary General of the United Nations and the President of the United States have stressed recently.

For the coastal state, there would be the assurance that it had recognized rights to determine the nature, rate, and type of development of resources off its coast and who develops them; that it could apply higher standards to such development if it chose; that it could insure that such resources are available first to satisfy its own economic needs; that it could derive economic benefits far exceeding the value of the resources themselves from the industrial infrastructure that may accompany exploitation; and that it would share significantly in the direct payments made by the developer for his rights.

Although the problems of dealing with other marine resource activities are different in many respects, our underlying approach of rejecting absolute alternatives and attempting to accommodate coastal interests within an international framework remains essentially the same. Fish are a renewable resource that can and must be conserved for future generations. They move about, many over great distances crossing any conceivable limits of coastal state jurisdiction. This is not to deny that many coastal states have important economic interests in fisheries off their coasts. If the law of the sea is to be stable, the Law of the Sea Conference must take this fact into account and provide adequate protection for such interests. At the same time, the Conference should not grant any coastal state the right to prejudice the world food supply by prohibiting or burdening the ability of other states to catch what that state is not catching; the Conference must bear in mind its duty to ensure a maximum supply of food from the sea consistent with sound conservation practices.

The settlement of fisheries problems is, of course, closely connected with agreement on the breadth of the territorial sea. Indeed, it must be recognized that in the absence of such agreement, none of the other objectives I outlined would be meaningful. It appears that the overwhelming majority of states are prepared to reach agreement on a 12-mile territorial sea. Beyond that limit, special provision would be made for coastal state interests along the lines I have described. However, a 12-mile territorial sea would eliminate existing high seas areas in a large number of international straits. Accordingly, in order to protect navigation and overflight, agreement on a 12-mile territorial sea should be accompanied by agreement on free transit through and over international straits. The critical fact is that it is exceedingly difficult, and frequently impossible, to navigate between seas and oceans without traversing a strait less than 24-miles wide. The right of innocent passage which does not include the right of overflight is too circumscribed in its scope and has been subjected to too many different interpretations to constitute an adequate substitute for the effective exercise of the freedom of navigation on the high seas.

Accommodation is not a simple process. It requires a careful analysis of the relevant, and frequently contradictory, national interests of each state. This analysis must then be applied to a broader canvas to achieve a balance of interests for the international community as a whole. But we must bear in mind that simplicity and theoretical purity must yield to the urgent need for the law to solve the real problems of states, protect their real interests, and build the kind of community in which they can mutually flourish. There will be no outpouring of nationalistic fervor in any country for the solution resulting from accommodation. Nor will there be a clarion call that the oceans have been completely internationalized. But if enough hard work is done, through accommodation we can satisfy particular national interests and take a large step toward a more just and orderly international community.

The CHAIRMAN thanked Mr. Stevenson for his moving and eloquent statement of how we have arrived at a sad state of affairs. He urged the audience to ponder over and analyze how accurately Mr. Stevenson had described the common interests and how realistically he had evaluated the alternatives.

The CHAIRMAN then introduced the next principal speaker, Mr. Cecil J. Olmstead, President of the American Branch of the International Law Association.

### REMARKS OF CECIL J. OLMSTEAD \*

Mr. Chairman, if the subject matter we are considering were not so very vital to the security and well-being of our nation, I would be inclined, in words with which you are all familiar, to refer to our discussion this evening in terms of "never have so many words been used to describe and analyze something so simple."

As regards natural resources, the United States is rather rapidly becoming a have-not nation. And this is particularly the case with petroleum resources. The ratio of years of reserves to annual production of U. S. natural gas has declined from 26.9 in 1950 to 12.1 in 1970. Reserves of crude oil for the same period have declined from a ratio of 13 to 8.9, excluding Alaska. Even assuming production of North Slope of Alaska reserves of crude oil during the coming decade and the continued development of oil and gas in the continental margin offshore the United States, nevertheless, in the decade of the 1980's, our country will have to import more than 50% of the oil and gas that it will consume.

There is little need to describe in detail the potential political and economic risks that result from a heavy dependence upon imported energy sources. Recently the results of such dependence have been dramatically illustrated by the concerted action of most of the world's petroleum-exporting countries. Through such concerted action, coupled with threats of supply interruptions, these countries secured a very large increase in their

\* President, American Branch, International Law Association.

revenue from petroleum exports. Had the United States today been dependent on oil imports to the extent of Europe and Japan, you may be assured that the increases would have been even higher. The fact that the United States is not now dependent on imported energy exerts a measure of restraint upon foreign producing areas and relieves it of certain pressures upon its initiative in matters of foreign affairs. Thus, I believe it to be a matter of genuine national security that the United States seek to provide for its essential energy requirements, including oil and gas, from sources under its own jurisdiction and control. U.S. domestic supply of a substantial portion of its own energy requirements also has the important effect of adding a measure of stability to international supply arrangements.

Against this background of declining U.S. petroleum reserves and rapidly rising requirements, the long-range importance of the entire United States continental margin as a potential source of oil and gas supply is well illustrated by a U.S. Geological Survey estimate of the potentially vast resources in place of 660–780 billion barrels of oil and 1,640 to 2,200 trillion cubic feet of natural gas in the U.S. offshore from the outer limits of the territorial sea to a water depth of 200 meters. It estimates potential resources in place between 200- and 2,500-meter isobaths as being of nearly the same magnitude. The recoverable oil and gas from these areas could be greater than all of the petroleum found and produced in the land areas of the United States.

Whether by interpretation of the Geneva Convention on the Continental Shelf or under customary international law principles, coastal states, including the United States, hold exclusive sovereign rights in the mineral resources of the seabed and subsoil of the submarine areas adjacent to their coasts. There is no difference in ultimate result if one adopts the Geneva Convention approach of a limit of 200 meters' water depth plus the exploitability limit or the customary law approach of the natural geological prolongation of the coastal land mass into and under the sea, as confirmed by the International Court of Justice—the *North Sea Continental Shelf* Case.

Although there are unquestionably conflicting views among nations regarding the control and uses of the oceans, one should not lose sight of the fact that in a very important element of this subject some 47 states—developed and developing, capitalist and Socialist, coastal and landlocked—have become parties to the Geneva Convention on the Continental Shelf. In today's world, such agreement among nations is no mean accomplishment and should not be lightly disregarded.

While recognizing fully that there are a variety of other important considerations involved in the matter of control and use of the oceans, I believe strongly that the United States should maintain exclusive jurisdiction over both exploration for and development of the mineral resources of its continental margin. And this interest is subject to harmonization with other uses of the oceans. If the United States Government so decides, it would not be for a private party to comment upon the sharing



of our Government's revenues from development of these mineral resources with the international community, particularly for the economic development of the developing countries. However, as a taxpayer one can question whether one half to two thirds of the revenues received is an excessive transfer to such purposes.

It is important that the development of seabed mineral resources be carried out in a manner that does not unreasonably interfere with other uses of the water column above and of the seabed itself. Indeed, if there is to be a new treaty, it should in the strongest terms reaffirm and guarantee the historic freedoms of the high seas.

On the other hand, the failure of a few states to adhere to customary and conventional law regarding freedom of the high seas should not be employed to obfuscate general policy objectives in all aspects of use and control of the oceans. Thus, because a few states have failed to adhere to the doctrine of freedom of the seas, there is no reason for the United States to propose a renunciation of its jurisdictional rights in the mineral resources of its continental margin in return for the uncertain status of "international trustee" in the hope that somehow this will gain adherence to that international law doctrine. Important as that doctrine is, the way to achieve respect for it would not appear to lie in an ill-defined and unrelated trade-off of national rights in seabed mineral resources.

Development of mineral resources of the continental margin certainly must be conducted compatibly with preservation of the marine environment, and standards for operations here as with all ocean operations are highly appropriate concerns for international agreement. Indeed, the limits under international law on national jurisdiction and the very nature of the oceans demands international agreement for an effective approach to marine environmental goals.

Interests of states in control and uses of the oceans are not limited to navigation and to mineral resources of the seabed, but today include at least fisheries, recreation, waste disposal, desalinization and use of the waters, and of course military uses, including overflight. Undoubtedly, the curiosity of man and developments in technology will lead to even more diverse uses in the years ahead.

Fisheries constitute the number one economic resource of the oceans today. There are of course serious conflicts concerning control of the oceans for fisheries rights. These conflicts may in some cases appear as claims to territorial sea of extensive breadth. If the fishing interest is basic to the territorial sea claim, surely rational consideration could accommodate that interest without impairing the right of free navigation in large areas of the world's oceans. And of course there are conflicts among fishing interests, *per se*—the coastal fishing interests and the deep-water fishing interests—and these conflicts can occur within a state as well as among states. The reasonable primary interests of coastal states in fisheries off their coasts should be recognized and determined, perhaps thus minimizing conflict in other types of ocean use.

The extent of the territorial sea has been a matter of international controversy for a long time. From a personal perspective, I see little merit in the United States' proposal of a 12-mile breadth. This proposal will not attract the extremists but would, if accepted by the modest claimants of today, remove substantial areas from the status of high seas. I would have thought it a preferable approach to continue adherence to a narrow concept of territorial sea to preserve a maximum high seas area, and to identify and define other interests of states in the oceans and the seabeds below and to accommodate those on their individual merits.

Mr. Chairman, perhaps I have gotten off my reservation and should return to it. Thus, in closing, I would like to re-emphasize in the strongest terms possible the tremendous importance of the United States continuing its exclusive jurisdiction over the petroleum resources of the continental margin off its shores. This is vitally important to our nation's objectives for decades to come. The fact is that there is no known feasible energy substitute in the foreseeable future. While these are strong words, it would in my opinion border on national catastrophe for the United States to cede to an international organization the power under any circumstances to order it to suspend mineral resource development in its continental margin.

The CHAIRMAN thanked Mr. Olmstead for his eloquent and carefully documented presentation of the United States exclusive interests and for the indication of some of the inclusive interests that this country shares with other members of the international community. Once again the task before the audience, the CHAIRMAN pointed out, was to examine whether the alternatives presented by Mr. Olmstead, or those presented by Mr. Stevenson or those that might be articulated by others, would be the most desirable for purposes of accommodating the different interests at stake.

The CHAIRMAN, after noting the pre-eminent contributions of Canadian members to the programs and activities of the Society over the years, next introduced the first commentator, Mr. Alan Beesley, Legal Adviser, Department of External Affairs of Canada.

## COMMENTS BY ALAN BEESLEY \*

In commenting upon the one theme common to the two previous statements, that is, freedom of the high seas, I would like to put forward some of my own views as well as those of my government. I shall attempt a somewhat historical approach, because we are today again, in my view, at a similar position as were states in the 17th century when they were required to come up with new solutions to relatively new problems.

At the United Nations we will be discussing policies relating to a series of problems such as seabed, continental shelf, territorial seas, passage through straits, fisheries, scientific research and pollution, each one of them

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extremely complex. I suggest that what is needed on every one of them is an accommodation between maritime and coastal interests, if we are going to have a successful outcome at the Law of the Sea Conference.

I could agree with so much of Mr. Stevenson's exposition of the doctrine of the freedom of the seas that whatever differences we may still have are largely ones of degree and emphasis. We are all aware of the fact that the conflicting uses of the seas are the result of conflicts of interests as old as or perhaps even older than the law of the sea itself. Broadly categorized, the conflict is between the special interests of coastal states in the uses of the sea adjacent to their shores and the general interest of all nations in the use of all the reaches of the sea. With apologies to our Chairman, I would like on this question to quote from his article on "Community Perspectives Versus National Egoism":

The oceans of the world were at one time claimed for the exclusive use of a limited number of states, but concern for the more general interest of the whole community of states ultimately succeeded in freeing the larger expanses of the oceans for relatively unhampered use by all. The knowledge is equally familiar, however, that coastal states never surrendered their claim to exclusive and comprehensive authority over certain adjacent areas of the sea; and that even after a consensus had developed that states were not to exercise continuing and comprehensive authority beyond a relatively narrow belt of such waters, it was quickly discovered that the occasional exercise of some coastal authority beyond this belt had necessarily to be honored if the special interests of coastal states were to be given adequate protection.

However, this capsule outline of the doctrine of the freedom of the seas does not bring out the fact that the doctrine was the product of efforts on the part of the then European states to master the seas for the promotion of their individual interests. So it is not appropriate to moralize, in my view, about the doctrine of the freedom of the seas as if it were the eleventh commandment. It is, however, a functional doctrine and if it is modified and modernized it can continue to serve certain important objectives. I think most of us have been guilty of regarding the doctrine as immutable in nature. Unless we relinquish the inhibitions generated by such an approach, the doctrine can become a bastion of reactionary attitudes, a yoke around our neck.

We in Canada consider, for reasons I will mention, that the doctrine of the freedom of the seas has tended to become translated, in practical terms, into the exclusive jurisdiction of the "flag states" over their vessels on the high seas, which, when observed closely, is nothing but an extension of sovereignty rather than an abdication of it. Although the freedom of the seas concept has served the general community interest, it has also been the instrument for the interests of the "flag states," which tend to be the major maritime Powers. The interests of these countries, I suggest, are not necessarily synonymous with the interests of the general community. This becomes evident when one considers the marine pollution which has resulted from the strict application of the doctrine of the freedom of the high seas.

Thus, this basic dichotomy between coastal states' interests and the general community interests is a little less simple and clear-cut than it appears at first sight. There are, in addition to the coastal and general community interests, what may be best described as "flag state" interests. These are somewhat of the same nature as coastal state interests, except that they have acquired a protective coloration of their own. The situation is further blurred by the fact that almost all littoral states may be said to have both coastal and "flag state" interests to which they have given varying weight at particular times, under particular circumstances. Canada, however, is predominantly a coastal state and does not have a big maritime fleet under its control. But we do have a substantial interest in trade and are conscious of our dependence on the freedom of the high seas.

This balance of interests which has been weighted, until very recently, rather heavily in favor of the "flag state" freedom to sail the high seas unfettered by any law but its own, has begun to right itself in response to new problems and new opportunities created by science and technology. However, the process of readjustment has proven somewhat difficult and has generated controversy of which we are all well aware.

While many nations have expressed their willingness to settle the controversies thus generated through multilateral means, and a certain number of them have also protested unilateral extensions of coastal states, including those of Canada, it must nonetheless be recognized that these unilateral actions have been prompted by genuine needs. The dispute then becomes more one of modalities. On the question of modalities, too, we are witnessing the development of customary international law. Customary law develops essentially through extensive state practice followed by general community acquiescence. We are hopeful that with respect to Canadian practice such community acquiescence will develop with time.

Whether we refer to the seabed or to the continental shelf or to the territorial sea, we find the necessity of arriving at some accommodation of differing interests, and, on the basis of the present structure of the international society, within the United Nations. This means in practice that such accommodations could be worked out only through the discussions that are being held within the U.N. Preparatory Committee for the Law of the Sea Conference. On the basis of the work done so far within the Preparatory Committee, the achievement of accommodation may be a little farther away than the 1973 Law of the Sea Conference unless we take care to increase the momentum of the Committee's work.

On the whole, I believe it is rather pointless to become doctrinaire either about the freedom of the high seas or about the assertion of exclusive interests of the coastal states. Canada has, through some well-known experiences, assumed a favorable vantage point to view the rationale behind the contrasting perspectives. There is, however, a possibility, in our view, for accommodations on the many problems before us, as more and more participants in the Committee realize the necessity of appreciating each other's positions and interests.

Regarding the Nixon proposal, we in Canada have certain difficulties. For instance, the 200-meter outer limit suggested therein would give to the United States all of its geological continental shelf, but Canada would not retain on the basis of that limit all of its geological shelf. Further, while the U.S. State Department's claim about the balance of interests achieved under its draft has much validity, we believe the balancing has been done the wrong way. Our problems are not related so much to the revenue-sharing aspects, as to the competence of a coastal state to control the activities off its shores. Nevertheless, we think the U.S. draft represents an imaginative approach, poses all the problems that need to be considered, and that it constitutes an extremely useful contribution to the work of the Law of the Sea Conference.

With respect to problems of the territorial sea and passage through straits, we are willing to discuss them at the Law of the Sea Conference (although we already have a twelve-mile territorial sea and have only non-international straits). Similarly, the fisheries problem, which might prove to be the most difficult one to negotiate, must be included in the agenda. Here we have on the one hand the demands of distant-water fishing countries, and on the other the claims of coastal countries like Canada and Iceland whose living resources off their shores are in real danger of extinction.

There is also a dichotomy of interests concerning the recognition or denial of freedom of scientific investigation. No country or private academic or business organization would like to share the scientific information, which it collects at an enormous expense, with others without some fee. Equally, no coastal state would sit idly by while foreign countries or corporations conduct research off its shores about which it knows nothing. The U.S.A. took such a position in expressing concern about its vital interests in response to a UNESCO questionnaire on the Ocean Data System.

The management and prevention of marine pollution raises the biggest bundle of issues. We do not think that the existing law is adequate. Essentially, under the doctrine of the freedom of the seas, which we consider as "non-law" for this purpose, every state is free to traverse any part of the oceans and pollute it at its will. The IMCO Conventions are a good start, but still are grossly inadequate. We do not understand why a state is entitled to sink a ship many miles off its shores, but cannot ask the Captain to alter course or bring the ship into port before damage is done to the environment. Equally, it is difficult to understand why the "flag state" jurisdiction is sacrosanct until a catastrophe occurs, and why, when this happens, the flag state jurisdiction disappears like magic, leaving the oil owners or cargo owners or shipowners, or the coastal state, to pick up the tab on liability.

These aspects raise very interesting problems and Canada has, I think, shown that it is as willing and as active as any other state in the United Nations to negotiate through multilateral channels to arrive at an accommodation with respect to all of them. We are hopeful that such accom-

modations can in fact be achieved in 1973 on the basis of our shared perceptions of the common interests of the international community.

The CHAIRMAN congratulated Mr. Beesley on his thought-provoking comments and told him that, whether or not he agreed with his preferences, he was impressed by his sense of relevant authority.

Mr. BERNARD OXMAN, Assistant Legal Adviser, Department of State of the United States, was presented by the CHAIRMAN as the second commentator.

### COMMENTS BY BERNARD OXMAN \*

I would like to address myself chiefly to the points raised by one of the two principal speakers: first, the interests of this country, and indeed of many other countries, to secure an adequate supply of energy resources. This is an important consideration, and many political and other factors can interfere with the flow of these resources to the United States. Without engaging in a battle of statistics, I would like to ask this question: If the United States had sovereign rights under the Continental Shelf Convention over all of the continental margin, including the continental rise off of its coast, would that be sufficient to free future generations of Americans from the necessity of importing critical quantities of energy source materials for their domestic needs? Insofar as it is desirable for the United States or any other coastal country to have available to it a secure source of energy which it can use first, there is absolutely no doubt that the Nixon proposal achieves that goal. I quote from Mr. Stevenson's address. In describing the benefits to the coastal state of the system of trusteeship, he said without equivocation that the coastal state "could ensure that such resources are available first to satisfy its own economic needs." There is absolutely no doubt then as to the commonality of objectives.

There is also a question of achieving these objectives. In this connection, I would like to cite some specific provisions from the United States draft convention which was submitted to the United Nations as a working paper. Specifically I refer here to paragraphs (a), (b), and (c) of Article 28 of that convention. Article 28 (a) says that the coastal state will decide the licensing procedure in the trusteeship zone. Under Article 28 (b), the coastal state is given authority to determine whether a license shall be issued. Thus it is up to the United States or to any other coastal state to decide, if it so chooses, against the development of resources in the trusteeship zone, for example, to keep these resources as reserves, to avoid complications arising out of competing uses of the sea, or for any other reason. Under Article 28 (c), the coastal state can further (without violating Article 3 which is a clause on non-discrimination) discriminate among applicants for licenses in any way it chooses. This is an express

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exception to the non-discrimination provision in Article 3. These provisions read together do invest considerable authority and control in the coastal state over the trusteeship zone, and in this light one really cannot lay charges of wholesale giveaway against the Federal Government of the United States.

It may be that the balance of authority has been shifted in one direction or the other. Indeed, it is pointed out that the balance has been shifted in favor of the international organizations. Again, as Mr. Stevenson noted, this is a problem that can be resolved pragmatically.

It is argued that what is entailed is a relinquishment of sovereign rights in exchange for the uncertain status of trustee. But again I believe that whatever uncertainty there might be in the U.S. draft can be resolved during the negotiating process that is under way, and by the time we get through the Law of the Sea Conference in 1973 we can be sure that the rights of coastal states in this respect will have been clarified.

All these issues involve the definition of the continental shelf as contained in Article 1 of the Continental Shelf Convention. The very first word that appears there is "continental shelf." We know that efforts were made to eliminate this word and substitute for it a term such as "seabed areas." These efforts failed. The term was retained, as noted in the commentary of the International Law Commission, to indicate the nature of the areas in question. Accordingly, I do not think we can address ourselves to the definition without referring to the words "continental shelf" and emphasizing only the term "adjacent." It is equally significant to note that a proposal to include in the definition the term "continental terrace" was rejected by the Geneva Conference. At that time "continental terrace" was understood by geologists to mean continental shelf and the slope. Hence, I often wonder how the proponents of a wide shelf doctrine manage to include the rise under the term "continental terrace." Further, Mr. Garcia Amador, who was mainly responsible for the adoption of the "continental terrace" concept at the Santo Domingo Conference, referred to adjacency as meaning about 25 miles. He also referred to the continental terrace as extending roughly to a depth of 500 meters. These views were part of the record of the legislative history on the definition of Article 1. We also know that Mr. Garcia Amador made other statements more recently which I believe are not relevant as legislative history.

Different outer limits beyond 200 meters were suggested for coastal state rights under the continental shelf doctrine and none of them proved to be acceptable to the states which attended the Geneva Conference on the Law of the Sea. In other words, the issue of outer limits is very much an open question, and it is to be resolved by us now. That is one of the tasks the United Nations is currently facing.

We also have to consider coastal state rights under customary international law. Among the sources of customary law, we look first to the Truman Proclamation, which simply used the term "continental shelf." It is reasonable to assume that it used that term as it was generally un-

derstood by geologists at that time. In a press release the White House simultaneously pointed out that by "continental shelf" it meant a submarine area to roughly 200 meters or 600 feet of water depth. The recent *North Sea* case heavily relied upon the Truman Proclamation for the exposition of the customary law on the subject. Moreover, we must bear in mind the fact—a fact that the Court itself noted—that the issues before it did not involve a decision on the seaward limit of the continental shelf.

The International Court of Justice used a doctrine of natural prolongation to describe the nature of coastal state rights over the continental shelf. On the basis of this doctrine the decision of that Court is that an absolute rule of division of continental shelves whereby all continental shelf areas closer to one state than to another state appertain to that state, is not the correct rule, and that one has to examine the problem in terms of natural projections or prolongations from the coast. Moreover, the Court never said what it meant by the term "natural prolongation." I submit that this term can be interpreted to mean anything you want it to, so long as you justify the demarcation as "natural." You can read it to mean the shelf up to the point where the slope begins to fall. Or you can read it to mean the entire block up to the point where it actually and physically meets the ocean floor. I find it faulty logic to reason that, under the Shelf Convention, continental shelf means adjacency, adjacency means margin, *ergo* continental shelf means continental margin: each of the premises is open to question. I find it equally without foundation to say what the International Court never said: that natural prolongation equals continental margin, in litigation itself called the *North Sea Continental Shelf* cases.

The CHAIRMAN thanked Mr. Oxman and introduced the third commentator, Professor L. F. E. Goldie, U. S. Naval War College.

## THE UNITED STATES DRAFT FOR A UNITED NATIONS CONVENTION ON THE INTERNATIONAL SEABED AREA<sup>1</sup>—A "POLITE CONVERSATION"<sup>2</sup>

By L. F. E. Goldie \*

This evening I shall merely offer a very brief outline of my views on the exceedingly elaborate<sup>3</sup> *United States Draft for a United Nations Convention on the International Seabed Area* (August 3, 1970).

First, the Draft's present formulation of the "International Trusteeship Area" arouses my skepticism. This is partly, but not entirely, due to the inappropriate invocation of the concept of the "trust" in this context. In

<sup>1</sup> Aug. 3, 1970 (mimeo.).

<sup>2</sup> With apologies to Dean Jonathan Swift.

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<sup>3</sup> This elaborateness, of course, may have collateral diplomatic uses of which we may all be unaware. It is sometimes diplomatic to oppose or delay a change in the



another room this evening, our Society is discussing Namibia as a failure in international trusteeship. As any reader of Victorian novels will tell us, the heiress is always exposed to losing all at the hands of her trustee when there is no Court of Chancery to control his ambition—and other vices. But over and above the Draft's invocation of the term "trust," I distrust both the "Trusteeship Area" concept and that of the "Intermediate Zone" out of which it grew, since I do not believe these to be solidly enough formulated to resist erosion under pressure either from coastal states or the proposed International Authority. It will inevitably be a transitory compromise. Unfortunately, it contains no indication of either the direction, or the means of the devolution, after its inevitable transmogrification or even demise, of the powers and privileges which are to be accorded to it. I have set out in more detail my grounds for this distrust in my article "Where is the Continental Shelf's Outer Boundary?"<sup>4</sup> So I will merely outline my own proposal at this time.

In place of a single blueprint for a regime of the "Intermediate Zone" or "Trusteeship Area" I suggested as alternatives first, a number of unifying forms of management, each of which was intended to be responsive to regional community needs in specific offshore areas between the continental shelf properly so called and the abyss, or, second, a bathymetric contour line to provide the boundary between the submarine areas under the sovereign rights of coastal states and those to fall under the international regime. First, where a state possesses a sufficiently extensive coastline and offshore continental shelf formation to enable it to assert a clear claim to an appurtenant zone extending to the continental rise, so that such a claim would not be vulnerable to the possibility of being smothered in overlapping claims by adjacent or opposite states, then that zone, which would be generally congruent with the Draft's Trusteeship Area, could

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law by offering one's own very elaborate proposal for change in the confidence that it will not be accepted *in toto*. Negotiators may then, in good conscience, contest a multitude of proposals for change until the time for the conference (or the pre-conference negotiations) has quite run out; for it should not be forgotten that these activities have quite rigid timetables set for their completion. One should credit this behavior with being far more enlightened than a brutal veto or even an obstinately defended negative position.

<sup>4</sup> 1 *Journal of Maritime Law and Commerce* 461 (1970) (hereinafter cited as "Outer Boundary"). See also my small addendum thereto "The Continental Shelf's Outer Boundary—A Postscript," 2 *ibid.* 173 (1970).

<sup>5</sup> This is a roughly congruent term to that of the U.S. Draft's "Trusteeship Area" which the Commission on Marine Science, Engineering and Resources (Our Nation and the Sea 151-153 (1969)), adopted. That Report (hereinafter cited as the "Stratton Commission Report") was accompanied by the reports of eight panels bound into three volumes, *i.e.*, Vol. 1, Science and Environment (1969); Vol. 2, Industry and Technology: Keys to Ocean Development (1969); Vol. 3, Marine Resources and Legal-Political Arrangements for Their Development (1969) (hereinafter cited as "Panel Reports").

The Commission was appointed by President Johnson on Jan. 9, 1967, pursuant to the Marine Resources and Engineering Development Act of 1966, 80 Stat. 203 (1966), 33 U.S.C.A. §1101 (Supp., 1967).

be brought within the regime of the coastal state's continental shelf. This could be done, and international claims be respected (provided agreement among nations could be achieved), by extending the affected coastal states' sovereign rights to the "rise" of the continental pedestal by means of a treaty. This may appear to have a similar effect to that sought by the National Petroleum Council's suggested interpretation of the Continental Shelf Convention.<sup>6</sup> If this incorporation of the zone within the coastal state's continental shelf regime were unacceptable as benefiting only certain coastal states, then a second possible blueprint for such coastal states' offshore zones between the 200-meter isobath and the rise could be to bring that area under the international regime for the deep-ocean floor, while leaving its administration and the collection of revenue derived from exploration and/or exploitation activities under the control of the coastal state. This second position would leave conjunct powers with the international agency and would allocate revenue to it, or to an international fund to which the agency would also be a contributor from the revenues it would gain from the deep ocean floor itself.<sup>7</sup>

A third possibility might be to recognize that the zone between the 200-meter contour and the rise of the pedestal enures to the coastal state, but that such a state would be specifically answerable for the administration of the zone to the international authority. At first blush, perhaps, this alternative may not appear to be too different from the *Draft's* Trusteeship Area. The distinction lies in the fact that in this possible option the lines of accountability should be clearly laid down, so that neither the coastal state nor the international authority could erode the other's competences and rights, thereby rendering this alternative a temporary dispensation. Another compromise blueprint could be formulated so as to divide authority and benefits between the coastal state and the international authority. This could be spelled out as recognizing that the coastal state's sovereign rights should be exercisable, subject to a list of specifically defined and limited, but overriding, powers vested in the international community; for example, the power of setting minimum standards for protecting the environment, or of prescribing the degree of liability for various kinds of catastrophic accidents or marine casualties, or of calling for non-discrimination against non-national enterprises.

Where a region of small or medium-sized states whose individual claims (if extended into the common adjacent continental shelf borderlands<sup>8</sup>)

<sup>6</sup> See "Outer Boundary," notes 8 and 9, and the accompanying text.

<sup>7</sup> On the Stratton Commission's International Fund proposal, see Stratton Commission Report 147-149, and 3 Panel Reports VIII, 35-38.

<sup>8</sup> The International Hydrographic Bureau, Monaco, has now accepted the following definitions (31 Int. Hydrographic Rev. 97 (May, 1954)): Continental Shelf, Shelf Edge and Borderland. The zone around the continent, extending from the low-water mark line to the depth at which there is a marked increase of slope to greater depth. Where this increase occurs, the term "Shelf Edge" is appropriate. Conventionally its edge is taken at 100 fathoms (or 200 meters), but instances are known where

would inevitably be smothered by the overlapping claims of all the other states of the region which abut onto a common shelf area, then the geographical zone equivalent to the Draft's Trusteeship Area should be co-operatively administered under one of several models of regimes of managerial or administrative conciliation.<sup>9</sup> Finally, where regional political instability, territorial rivalries, irredentism and long-term religious or racial hatreds preclude the establishment of conciliation regimes,<sup>10</sup> then that zone between coastal states' continental shelves and the rise<sup>11</sup> of the continental slopes should be administered by the international regime established for the administration of the resources of the seabed and subsoil of the deep-ocean floor.

At first glance the above group of proposals, even when the various alternatives are taken into account, would seem unduly to favor the "have" countries. They might appear to give to states of continental or sub-continental dimensions more extensive offshore submarine regions than they would to middle-sized or smaller states. I would like to point out, however, that as a practical matter small states would not get much under the Draft's Trusteeship Area proposal either, and landlocked states would get nothing. In fact, both of these classes of states would gain more from my proposed managerial regimes than from the Draft's proposals. The latter would, in practice, be more likely to assure to small coastal states the possibility of acquiring rights to future boundary disputes than of assuring them additional resources in economically significant quantities. Secondly, not only "have" countries would enjoy valuable increments to their offshore resources, but also a number of large and medium-sized "have-not" states, for example, Nigeria, Brazil, India, Argentina, the Federation of Malayasia, and Indonesia, would qualify to gain the addition of whatever increments to their continental shelves could be agreed upon under this blueprint.

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the increase of slope occurs at more than 200 or less than 65 fathoms. When the zone below the low-water mark is highly irregular, and includes depths well in excess of those typical of continental shelves, the term "Continental Borderland" is appropriate.

<sup>9</sup> For an indication of such regimes see Goldie, "The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?," 16 *New York Law Forum* 325, 367-376 (1971) (hereinafter cited as "Goldie, 'North Sea Cases'").

<sup>10</sup> For a discussion of this managerial or conciliation regime concept in relation to submarine mineral resources, see Goldie, "North Sea Cases" 325, 375-376.

<sup>11</sup> The National Petroleum Council has offered the following indication of the meaning of the continental rise as the boundary between the regimes of the continental shelf and of the deep ocean floor:

"Moreover, since the plunge of the slope has often been locally overlapped extensively by the sediments of the continental rise, a boundary just oceanward of the base of the slope, to include the shelf, the slope, and the landward portion of the continental rise, where developed, most closely approaches the true ocean-bottom boundary between continental and oceanic areas and is the most natural and appropriate outward limit of a country's sovereign rights over bottom resources. A boundary thus drawn gives recognition to the natural oceanward extension of the domain of each coastal nation and the inclusion under its jurisdiction of that suboceanic territory over whose natural resources the coastal nation is most practically suited to exercise control." National Petroleum Council, *Petroleum Resources under the Ocean Floor* 67 (1969).

Thirdly, these proposals are intended to bestow advantages on Balkanized regions which are parallel to those enjoyed by federations. A managerial regime is also a supranational authority. As such it may offer the means of removing some of the more deleterious results of disunity in a region from the administration of offshore resources beyond the 200-meter isobath. A further advantage is that the landlocked states of the region could also participate in, and benefit from, the regime, whereas they are inevitably excluded from participating in the fruits of the Draft's "Trusteeship Area."

In drafting regimes to operate as buffers between the regime of coastal states' continental shelves and a world-wide regime to govern the resources of the abyss, statesmen and lawyers could well be guided by Judge Padilla Nervo's evaluation of the continental shelf doctrine. He said:

The purpose of the continental shelf doctrine and of the Convention is to *contribute* to a world order, in the foreseeable rush for oil and mineral resources, to avoid dangerous confrontations among States and to protect smaller nations from the pressure of force, economic or political, from greater or stronger States.<sup>12</sup>

These proposals are intended to assure to small states a share in the benefits which federalism can bring them with respect to areas between their continental shelves and the abyss, either directly by encouraging federation, or indirectly by the establishment of a supranational managerial authority over the zone between the outer limits of the continental shelf and the abyss. It is submitted that they could more effectively "contribute to a world order . . . and protect smaller nations . . ." than could the Draft's recommendation of a "Trusteeship Area."

My alternative proposal to these various regimes is to suggest that another type of compromise be offered. This could consist of defining the continental shelf's outer boundary in terms of a uniform bathymetric contour line at a considerably deeper level than the Continental Shelf Convention's 200 meters, or in terms of a measured distance from the shore as an alternative to the test of depth when there is little or no continental shelf at the requisite depths. Senator Claiborne Pell's proposal that the continental shelf shall be "the seabed and the subsoil of submarine areas adjacent to the coast but outside the area of the territorial sea to a depth of 550 meters or to a distance of 50 miles from the baseline from which the breadth of the territorial sea is measured, whichever results in the greatest area of continental shelf"<sup>13</sup> may well provide the most viable definition.

<sup>12</sup> North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 3, 92 (Judge Padilla Nervo's emphasis).

<sup>13</sup> "Declaration of Legal Principles Governing Activities of States in the Exploration and Exploitation of Ocean Space," Art. VI, Activities of Nations in Ocean Space, Hearings Before the Subcommittee on Ocean Space of the Senate Committee on Foreign Relations, 91st Cong., 1st Sess., at 9, 14 (1969). A similar depth criterion to that proposed by Senator Pell is his Res. 263, 90th Cong., 2d Sess., namely, that 600 meters would have similar advantages. It should be noted, however, that while S. Res. 263 proposed the cut-off bathymetric contour line as being that of 600 meters, S. Res. 33 advocates the 550-meter bathymetric contour line as the demarcation be-

My second major criticism of the Draft relates to its approach to liability for harms arising from polluting and risk-creating activities, which seems very chaotic. Articles 11(4), 27(2)(e), and Appendix A, Section 12, could be made not to agree in the hands of a skilled interpreter. Furthermore, the Draft would not appear to attempt to indicate any uniform treaty standards of liability for harms (contrast, for example, the Brussels Convention on the Liability of Operators of Nuclear Ships and the 1969 IMCO Convention on Liability for Oil Pollution Damage). Surely, this should be done? The Draft also leaves, in Article 27(2)(e), a possible loophole which could be interpreted as allowing the continuation, in the regime the Draft is intended to establish, of individual state standards of liability for harm. This could give rise to complex conflict of laws problems of intellectual interest only to law teachers, and of monetary interest only to those members of the Plaintiffs' Bar who could monopolize the golden harvest resulting from such an interpretation and construction of the appropriate provisions.

Third, Article 11(5) should make provision for the possibility of bringing suit against an international entity or consortium as such, rather than merely making the participating states jointly and severally liable. In my article "The Oceans' Resources and International Law—Possible Developments in Regional Fisheries Management," I outline a rationale for this proposal.<sup>14</sup> At this point I would like to suggest the following change in paragraph (5). Delete the words "or through an international organization." Then at the end insert the following:

When such a group of States act together through an international or regional agency or organization which they form for the purpose, either that agency itself, or those States, jointly and severally, may be held responsible, at the option of the claimant or claimants, for harms; but not so as to allow an injured person to be doubly compensated both by the agency and by that agency's member States. That agency may also bring contentious suits before the Tribunal in the same manner as if it were a State.

This insertion could be either a second full sentence in paragraph (5) or, if it is preferred, a new subparagraph (b) of paragraph (5). The present paragraph (5), as amended, would then become subparagraph (a) of the new paragraph (5).

Fourth, I feel very strongly that it is time for everybody who is concerned about the erosion of the freedom of research on the high seas to stand up and be counted. It is a lawyers' paradox that quite often when

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tween the regime of coastal states' continental shelves and the regime of ocean space. This latter line is identical with that proposed by the United Kingdom and the Netherlands delegations in the Fourth Committee of the 1958 United Nations Conference on the Law of the Sea at Geneva. See Netherlands and United Kingdom of Great Britain and Northern Ireland, Proposal, U.N. Doc. A/CONF. 13/C.4/L.32, 6 U.N. Conf. on The Law of the Sea, Geneva, 1958, Official Records (Fourth Comm.) at 6 (Mouton), 36 (Gutteridge), 41 (Gutteridge), 44 (Mouton), 45 (Mouton), 46 (Mouton), 47 (Mouton), 48 (Gutteridge—a comment on the uncertainty of the International Law Commission's draft Art. 67), 135 (for the text of the United Kingdom Netherlands proposal), U.N. Doc. A/CONF. 13/42, Sales No.: 58. V 4, Vol. VI (1958).

<sup>14</sup> 8 Columbia Journal of Transnational Law 1, 40 (1969).

rights and privileges are created and defined, the definitions, no matter how carefully they are worded, come to be interpreted as providing outer limits of those rights rather than their "hard core" meanings. This has been true of the preservation of the freedom of scientific research in Article 5, paragraph 1, of the Geneva Convention on the Continental Shelf, which, of course, has not been helped by the opening sentence of paragraph 8 of the same article. Insofar as words can provide safeguards at all, a protection of this freedom might be achieved by opening Article 24 with a ringing proclamation that freedom of scientific research is one of the fundamental freedoms of the high seas and that Article 24, as well as the other relevant provisions of the Draft must categorically be interpreted as subject to this basic policy. I suggest, furthermore, that the draftsmen and diplomats should seek to assure immunity from coastal state interference for all *bona fide* scientific research culminating in open publication. Resource exploration and scientific military research should be expressly excluded from these assurances of immunity. In "The Contents of Davy Jones's Locker—A Proposed Regime for the Seabed and Subsoil" I indicated my concern for the erosion of this freedom by the local restrictions which coastal states are imposing on an activity which, to be effective, needs to treat the high seas as a unity and so should be free to range over their whole extent.<sup>15</sup> That article was published in 1967, and now, almost three years later, the reasons I gave therein can be greatly amplified and added to from the experience of a number of oceanographers, Americans and others.

Fifth, I suggest that consideration be given, perhaps, to the thought that, following the voting practice of the General Assembly of the United Nations, a distinction should be drawn in Article 34 (either in existing paragraph (5) or in a new paragraph) between decisions on important questions which shall be taken by two-thirds majority, and other decisions.<sup>16</sup>

Sixth, I am disturbed by the formulations in Article 46(1) of the tribunal's jurisdiction to give advisory opinions. My submission is that the model of the International Court of Justice should be followed. For, while I strongly support the view that the principal organs of the International Seabed Resource Authority should have the competence to request the tribunal for advisory opinions, I doubt very much whether the cause of advancing the settlement of international disputes by adjudication would be well served by this type of express formula allowing the participating states to bring advisory opinion suits before the tribunal. Opponents of the tribunal's jurisdiction could argue that the present formulation may, perhaps, be utilized by one state to obtain a judgment against an adversary in what is, in reality, a covertly contentious matter, thereby denying that adversary its day in court. As a matter of legal prediction one could argue that the decision of the Permanent Court of International Justice in the *Eastern Carelia Case*<sup>17</sup> makes the possibility of such a situation being permitted most unlikely. But political oppo-

<sup>15</sup> 22 Rutgers Law Review 1, 48-54 (1967) (hereinafter cited as "Davy Jones's Locker").

<sup>16</sup> See U.N. Charter, Art. 18.

<sup>17</sup> [1923] P.C.I.J., Ser. B, No. 5.

nents of the Draft, both in the Senate of the United States and in foreign countries, could use the possibility that advisory opinions might be permitted to bring unilateral actions behind the backs of adversaries (improbable as we know this possibility to be) as an argument against the acceptance of a maritime regime as a whole, or at least for either rejecting the compulsory jurisdiction of the tribunal or annexing a Connally-type reservation to its acceptance, thereby rendering that acceptance meaningless.

Seventh, I suggest that the "highest gross national product" test for determining which states should be "Designated Members of the Council," as set out in Section 1 of Appendix E, is not particularly relevant to the special qualifications which are needed for designating the kind of state to be selected. Where a mandatorily applicable test is given for designating a state, as in that section, then there is no room for discretion, or for the consideration of special circumstances. The International Court of Justice's test in the *Constitution of the International Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*<sup>18</sup> tells us that, when the member states of an organization are faced by tests such as that of the "highest GNP," they may only look to the statistics given by authoritative and accepted sources to ascertain who qualifies, rather than exercise judgment as to who may be designated or chosen. It is clear to me that there are maritime countries, for example, Norway, which may have very considerable claims to be named as "Designated Members," but which would probably be excluded on the basis of the Draft's present criterion. In addition, "Gross National Product" really measures nothing more than how busy a community is; for example, sending vast truckloads of frozen dinners from California to New Jersey and New York, and sending other vast truckloads of frozen dinners from New Jersey and New York to California. I fail to see why this sort of thing should be regarded as evidence that a nation is a leader, or is entitled to be viewed as setting an example in the rational and optimal allocation of its resources. Furthermore, the calculation of GNP does not include any subtractions for pollution or the blight of cities. In short, I believe the Draft's reliance on the "Gross National Product" to be a questionable fetishism.

In place of the test offered in Appendix E, Section 1, I would suggest there should be some special machinery for electing the Council's "Designated (or 'Special') Members" on the basis of their relevant qualifications; for example (and I offer this merely to illustrate my term "special machinery"), by a joint session of the Draft's Council and Assembly which could be called at prescribed intervals. The qualifications the special electorate should be called upon to consider and apply in electing "Designated (or 'Special') Members" could well include the following: (1) a state's scientific and technological leadership in maritime affairs; (2) the effectiveness and stringency of its anti-pollution and conservation legislation, especially as applicable in maritime affairs; (3) the degree of the dependence of its economy on deep ocean mineral resources (including

<sup>18</sup> [1960] I.C.J. Rep. 150.

oil, gas and sulfur, etc.); (4) the degree of moral leadership it is held to exert with regard to both the exploitation and the conservation of deep-ocean resources. You may note that, instead of offering a single criterion which leaves no room for discretion, I have suggested that general guidelines only should be formulated. Of course, those guidelines should be applied in a meaningful way by the special joint session when electing the "Designated (or 'Special') Members." If, in any election, those guidelines should be cynically disregarded, then I believe that the tribunal should have jurisdiction to review that election, and, if necessary, declare it invalid.

An alternative to the foregoing could be to dispense with the special group of "Designated (or 'Special') Members" altogether, and put all the member states on the same formally equal footing. If this seems too egalitarian, then, perhaps, some system of weighted voting rights in the Assembly might be all that it required to protect the interests of states which are most active and concerned in the exploration and exploitation of the deep ocean bed's resources. The attribution of such special voting rights might either be a matter for applying the criteria I have already proposed by the Assembly, or by the Assembly plus the Council sitting in joint session, or, alternatively, be the result of automatic qualifications; for example, the comparative amounts of investment by the various countries or by their nationals in the winning of deep ocean resources.

Eighth, despite the fact that in my fifth, sixth and seventh points I appear to have presumed the acceptability of the elaborate institutional machinery set out in Articles 31-65, I must now say that I basically question the need for all the organs which the Draft proposes. For example, why not provide that the International Court of Justice (which could do with the work) should carry out the tasks which the Draft allocates to its proposed tribunal? There may be problems, but not insurmountable ones, I suggest. It is an unfortunate fact that neither Chapter XIV of the United Nations Charter nor the Statute of the International Court of Justice envisages the Court exercising contentious jurisdiction over disputes in which international organizations, agencies, consortia, or multinational public enterprises are parties. This should be provided for, especially in terms of the draft proposal I put forward earlier in my discussion of the tribunal. That formula would expressly give those international and hybrid entities the right to sue, and expose them to being sued, in their own names. I would like to suggest with the greatest respect that, in the light of the insurmountable difficulties which would be faced in an attempt to amend the Charter and the Statute, it would not be beyond the ingenuity of the Court to devise an analogous rationale and procedures for adjudicating cases involving such entities to those developed in the Federal courts of the United States permitting corporations to sue and exposing them to being sued in diversity of citizenship cases.

Simplifying the procedure of adjudication by suggesting that the tribunal might not be a necessary institution for the regime reflects a more fundamental constructive criticism. Since the 14th century natural scien-



tists have come to be more and more persuaded by "Occam's Razor," despite its having the doubtful status of being a "self-evident truth" or, better, merely an unverified axiom for testing hypotheses. Occam is reported to have advised that "it is vain to do with more what can be done with less." It is now time, I suggest, for lawyers, diplomats and politicians to apply this same cleansing agent to their blueprints for social and political organizations and to their theoretical explanations.

Applying the principle of Occam's Razor to the document before us, we may well doubt that the Draft's three proposed Commissions will meet any real and urgent needs more effectively than simpler alternative agencies or even individual officials. For example, it seems reasonable to suggest that the work of the "Rules and Recommended Practices Commission" could be better done by experts in the Authority's Secretariat on the one hand, and by good-faith negotiations among the parties, if necessary under the auspices of the Council or the Court, on the other. I must emphasize that, especially in this and similar areas of international law, greater opportunity should be given to the creative function of good-faith bargaining. This is now a doctrine of international law since the International Court of Justice made it an essential part of the rationale for its holding in the *North Sea Continental Shelf Cases*. I recently emphasized this in my article "The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?"<sup>19</sup> Again, the work of the "Operations Commission" probably could be better done by negotiations conducted multilaterally in the kind of conferences I envision in my "Davy Jones's Locker"<sup>20</sup> article with regard to allocations, and by the recording agency which I also indicate in the same article.<sup>21</sup> The Draft's Operations Commission, I would also suggest, would do little more than duplicate the work of the Secretariat as to the more supervisory and generally "bureaucratic" matters.

Ninth, I strongly suggest that the International Seabed Boundary Review Commission's work could be better done on an *ad hoc* basis, and, following the thesis of the *North Sea Continental Shelf Cases*, by good-faith bargaining where necessary under the supervision of the International Court of Justice. The Court should be given power to appoint umpires in compliance with its authority to appoint assessors under Article 30, paragraph 2 of its Statute and Articles 7 and 8 of its Rules of Court, and by agreements to submit boundary issues to adjudication. Failing these voluntary approaches, there is always the compulsory jurisdiction of the judicial settlement machinery to fall back on.

Finally, the Draft's whole thrust is to emphasize production at the cost of the preservation of the environment.<sup>22</sup> This is illustrated by its allowance of the exclusive authority of the flag state, a fetish which is tragically underlined today when the world's largest tanker fleet flies the Liberian

<sup>19</sup> 14 New York Law Forum 325, 359-367 (1971).

<sup>20</sup> "Davy Jones's Locker" at 39-43.

<sup>21</sup> *Ibid.* at 43-46.

<sup>22</sup> For a discussion of the counterpoint of production and pollution see Goldie, "International Principles of Responsibility for Pollution," 9 Columbia Journal of Trans-

flag. As *The Economist* recently pointed out, accurately reflecting the paradoxes and frustrations in the contemporary international law and practice regarding the Liberian flag:

If a foreign vessel is caught discharging oil in mid-Channel, the evidence is passed to the country where it is registered for legal action to be taken. But a nation like Liberia, with the largest tanker fleet in the world, simply does not have enough machinery for enforcement.<sup>23</sup>

It is no surprise that *The Economist* has also passed on to us the advice of a Greek owner of Liberian-flag vessels on his view of the best way to avoid the effects of polluting the sea by oil. "Build swimming pools," he is reported to have said.<sup>24</sup> In not limiting the authority of flag states, or creating meaningful alternative sources of decision for regulating the ships on which the proposed regime's communications, transportation, and, possibly, processing services might to a large extent depend, the Draft perpetuates flags of convenience as law-avoidance devices. In so doing it further vitiates its own meager expressions of concern about maritime pollution.

The CHAIRMAN thanked Professor Goldie and introduced Mr. Leigh Ratiner, Chairman, Defense Advisory Group on the Law of the Sea, U.S. Department of Defense, as the last commentator on the Panel.

### COMMENTS BY LEIGH RATINER \*

I would like to make one major point. What Mr. Stevenson has referred to as the crisis in the law of the sea can be more appropriately characterized, as Mr. Pardo did, as a revolution. This revolution is brought about by coastal states such as Canada, Chile, Peru, Ecuador because of their disenchantment with what Mr. Beesley described as the "doctrinaire concept of the freedom of the seas." The United States' current policy is essentially a response to this revolution.

We have our domestic problems within the United States. There are signs of lawlessness everywhere which provoke demands for strict law enforcement. Every day we wonder which side of the revolution we belong

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national Law 293-294, 311-312, 325-329 (1971) (hereinafter "Goldie, Responsibility"); Goldie, "Amenities Rights—Parallels to Pollution Taxes," *Natural Resources Journal* (1971). See also Mishan, "The Spillover Enemy," 33 *Encounter* 3 (No. 6, 1969); and Ramsey, "We Need a Pollution Tax," 36 *Bulletin of Atomic Scientists* 3 (No. 4, 1970).

<sup>23</sup> 239 *The Economist* 77 (April 10, 1971); but see, now, "Plugging Some Leaks," *ibid.* 80 (May 8, 1971). I have myself long been a voice crying in the wilderness on this topic. See Goldie, "Flags of Convenience (A Review of Boczek, *Flags of Convenience: An International Legal Study*)," 12 *Int. and Comp. Law Q.* 989 (1963); Goldie, "Recognition and Dual Nationality," 39 *British Year Book of International Law* 220 (1963); and Goldie, "Responsibility" at 319-327.

<sup>24</sup> 224 *The Economist* 794 (Sept. 2, 1967).

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to. A similar situation of lawlessness appears to exist with respect to oceans. Perhaps this will continue to exist until we have a new law of the sea conference.

We have to choose from two kinds of responses that are available to deal with the situation of lawlessness relating to the oceans. One of the alternatives is to rely upon the maritime strength the United States and the U.S.S.R. possess to enforce law or what we have come to know as the freedom of the seas. But this does not appear to be a wise policy, if we are at the same time motivated by the desire to preserve peace. That is the reason why the United States does not want to confront Canada with Naval fleets to assert the U.S. rights of navigation in Arctic waters, or follow U.S. tuna boats with gunboats to protect their fishing off Peru, where we think we have a right to fish. Instead, we chose the other alternative. We have agreed that a resolution of outstanding issues is needed to make the law of the sea more just and reflective of contemporary aspirations of the different nations in the world, whether they belong to the developed or developing, landlocked or shelf-locked, or to the super-Power category. In this effort to revolutionize the law of the sea we are of course not attempting, as Mr. Stevenson pointed out, to throw out existing conventions.

With this basic approach, we have attempted to construct, not a "Chinese pagoda" as some alleged, but a sensible response to the revolution, so that it would not be necessary for us to have conflicts among nations to modify the law of the sea. Mr. Beesley calls the freedom of the seas concept doctrinaire, and, I think, one would also have to characterize Mr. Olmstead's insistence on our sovereignty over the continental margin as doctrinaire. The argument that the definition of "continental shelf" is such that the coastal states already possess sovereign rights over the natural resources of the adjacent submarine areas up to the abyssal depths, as Mr. Oxman previously indicated, is not appealing. There are better interpretations of the Continental Shelf Convention which weigh against such a position.

The term "sovereign rights" has become almost synonymous with sovereignty and, together, these are used fanatically by the proponents of broader boundaries—broader boundaries not only for mineral rights but also for fisheries and for the control of marine pollution. "Sovereign rights" should not be regarded as a religion and they are something we can give up in some measure for the promotion of common interests.

The President of the United States, in proposing a new ocean policy for the general approval of the international community, is attempting to accommodate and reconcile dozens of different major, vital interests that are of concern to us and to other countries. The result is the Trusteeship Zone. If there is any other better way of solving this revolution without having to use force to protect our vital interests, we need to know it. Perhaps Professor McDougal, who appears to be critical of our thinking, will enlighten us about it and propose a more constructive approach.

The CHAIRMAN thanked Mr. Ratiner, and indicated that he would later, as best he could in the time available, respond to the request in his concluding remarks. He then invited comments from the floor.

Professor VED P. NANDA. My question is to Mr. Olmstead. He mentioned that 46 countries have ratified the Convention on the Continental Shelf and that it must be regarded as representative of current community expectations of authority and control regulating the exploitation of offshore natural resources. But he very conveniently omitted the fact that, at the time the convention was entered into or at the time the convention was being prepared, there was no expectation that we would soon be able to exploit at much greater depths than 200 meters. It is quite possible, that given the present technological capabilities, the international community would have come up with an entirely different treaty on ocean resources than the Continental Shelf Convention.

Mr. OLMSTEAD. Because the question relates to a point also raised by Mr. Oxman in his comments, I would deal with both of them together.

To my knowledge, only 40 states and not 46 states have ratified the Continental Shelf Convention of 1958. Perhaps more nations have ratified since the time I last looked into the matter. [Actually 47 states have ratified.]

What was intended by the authors of the Geneva Convention on the Continental Shelf, when they defined continental shelf the way they did? It is worthwhile reviewing the legislative history very briefly. The United Nations in 1949 requested the International Law Commission to make preparatory studies on the law of the sea. The Commission conducted those studies and produced its first draft in 1951. This draft described the continental shelf, over which a coastal state was given exclusive jurisdiction, as "the seabed and subsoil of the submarine areas contiguous to the coast but outside the areas of territorial waters, where the depth of the superjacent waters admits of exploitation of the natural resources of the seabed and subsoil." This so-called criterion of exploitability does not refer to any limitation of water depth. In 1953 the Commission reversed itself, proposing that the coastal states' exclusive jurisdiction be defined solely in terms of water depth.

The United States and 19 other American republics rejected this new approach of the Commission. When they met at the Ciudad Trujillo Inter-American Conference in March, 1956, the American Delegation, on the instructions of the Eisenhower Administration, voted for a resolution at the Conference which insisted that coastal states' exclusive jurisdiction be extended "to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits to the exploitation of the natural resources of the seabed and subsoil." The conference report made it clear that the change was intended to include the continental terrace under coastal states' exclusive jurisdiction. The continental terrace is defined by the report as that part of the land mass of the submarine areas formed by the shelf and slope. The slope in turn is defined as extending "from the edge of the shelf to greater depths."

In 1956 the International Law Commission again changed the definition of the continental shelf to "the seabed and subsoil of the submarine areas adjacent to the coastal state, but outside the areas of the territorial sea, to a depth of 200 meters or beyond that limit to where the depths of the superjacent waters admit of the exploitation of the natural resources of the said areas." The Commission's final report in 1956 mentioned that the change in the definition was in response to the resolution of the Ciudad Trujillo Conference.

When the convention came before the Senate of the United States for advice and consent, the distinguished American lawyer who had been Chairman of the American Delegation at the Geneva Conference told the Senate Committee on Foreign Relations that the addition of the exploitability criterion in the definition was supported by the United States and was in conformity with the conclusions of the Inter-American Conference that had met at Ciudad Trujillo in 1956. The Senate consented to the convention and ratification occurred on March 26, 1961.

I would interpret this history as certainly intending to embrace the continental terrace in the definition of continental shelf. Certainly that was the United States view of it. This was accepted expressly by the Commission. The inclusion of the exploitability criterion signifies that everyone at that time was aware of the future technological capabilities. It is also interesting to note that the process of ratification is a continuing one, and that states have recently ratified so that the number now stands at 47. So it cannot be said that these nations act without the benefit of their perception of the evolving technology.

Mr. WILLIAM L. GRIFFIN. Over the past few years much of the debate on the width of the legal continental shelf has been reminiscent of the debate on how many angels can dance on the head of a pin. In final analysis two separable and unrelated points are involved: (1) control of the on-site exploiter and (2) sharing of the benefits. It seems clear from state practice that no state will countenance activities not subject to its control in international seabed areas off its coasts. Thus it is now, or will become, international law that such on-site exploiter will be the tenant of the coastal state. The on-site exploiter, as tenant, has a proper interest in the operating terms and conditions of his tenancy but he has no proper interest in what his landlord does with the rent. The latter is a policy decision of the landlord's. The U.S. draft treaty's trusteeship concept is in keeping with these views.

However, the "trusteeship" label is unfortunate because it is a term of Anglo-American law and smacks of neo-colonialism in the minds of many. International law has in the past borrowed from Roman law, especially in matters relating to territory. There is a Roman law concept which could be borrowed to replace the "trusteeship" terminology. I refer to the Roman law doctrine and form of action known as *negotiorum gestio*, which, roughly translated, means "management of the affairs of another." Under certain conditions, one person was entitled to step in and manage the affairs of another and be reasonably compensated therefor. This Roman law doctrine exists today in French and German law as a remedy for the

prevention of unjust enrichment. With a little progressive development and codification it would be well suited to the concept of a seabed intermediate zone.

MR. MAXWELL MCKNIGHT. Mr. Ratiner seems to have taken the albatross off his neck and put it around the petroleum industry's neck. It ought to be made clear to this audience that the petroleum industry is not alone in its opposition to certain aspects of the Administration's position. Without naming other organizations, may I read a very brief extract of the conclusions reached on the coastal state's right to control offshore resources by the Special Subcommittee on the Outer Continental Shelf of the Senate Committee on Interior and Insular Affairs, 91st Congress, 2nd Session, dated Dec. 21, 1970:

Whatever renunciation might be intended to be made through the adoption of a future seabed treaty, no renunciation should be permitted to be made which in any way encroaches upon the heart of our sovereign rights under the 1958 Geneva Convention. We construe the heart of our sovereign rights under the 1958 Geneva Convention to consist of the following:

- (1) The exclusive ownership of the mineral estate and sedentary species of the entire continental margin;
- (2) The exclusive right to control access for exploration and exploitation of the entire continental margin; and
- (3) The exclusive jurisdiction to fully regulate and control the exploration and exploitation of the natural resources of the entire continental margin.

Professor DANIEL WILKES. It seems to me that a significant controversy centers around the definition of the term "continental shelf." The fact that opposing views have been heard on the possible interpretation of this definition as contained in Article 1 of the Convention on the Continental Shelf, indicates that it must be recognized as a disputable point. The Stevenson-Oxman-Ratiner draft argues, I think, that it is not giving away any U.S. territory under its terms, but is only proposing a solution to a vague and problematic definition of coastal states' rights under the Continental Shelf Convention.

One can argue, for example, as Mr. McKnight did, that the clear history of the convention shows it intended to extend coastal states' jurisdiction up to the base of the slope. However, on the other hand, it can also be pointed out, referring to the Geneva Conference and International Law Commission documents, that the Indian and other governments rejected the slope-terrace argument and wanted to confine each coastal state's exclusive competence only to the outer limits of the continental shelf, and accepted British testimony that 550 meters' depth would signify the end of the continental shelf. When the definition of Article 1 referred to depths beyond 200 meters by way of the criterion of exploitability the history shows they were intending to cover only depths up to 550 meters.

No matter what side we take, what we essentially have here is a dispute. International law has a long history of dispute settlement, including disputes about territories. For example, Canadian border disputes as well as over one hundred and fifty similar disputes have been settled through

arbitration. Given this, I do not think we are giving away any of our territory.

Lastly, as a problem of resolving an international law dispute, this is appropriately for the State Department, rather than Congress, under American Constitutional law.

Dr. FRANCIS CHRISTY. I would like to have a brief clarification from any one of the three members of the government team. There is an apparent contradiction in the way the United States is treating the mineral rights on the one hand and the fishery rights on the other. According to the seabed draft, a coastal state has the right to close off access to mineral rights and charge rent for any use thereof. From what Mr. Oxman said earlier and at other meetings, such as the Law of the Sea Conference of the Marine Technology Society in February, these rights do not apply to fishery resource exploitation. Indeed, just the opposite holds true. The U.S. position seems to indicate that it is wrong to close off access to fishery resources and charge fees for their exploitation, as, for example, Ecuador is doing in Latin America, but that it is all right to do so for minerals. Unless there is considered to be some difference between these two resources, that is, fisheries are not a natural resource but something that is sacred, and oil and gas are a natural resource and therefore an item of commerce, I really do not see any justification for the different treatment given to them in the apparent U.S. position. I think this glaring contradiction should be explained.

Mr. STEVENSON. Perhaps one reason for the perception of an apparent contradiction in the U.S. draft on the treatment between mineral resources and the fishery resources is the fact that the United States Government has not yet submitted to the U.N. Seabed Committee a detailed proposal on the fisheries problem. What we have already indicated, however, is that we cannot get an agreement on the 12-mile territorial sea limit without at the same time arriving at some accommodation on coastal states' rights to regulate fishery exploitation off their shores. We made it clear that we are prepared to work out some preferential rights in favor of coastal states in this regard beyond the 12-mile territorial sea limit.

The reference to Ecuador raises an entirely different problem. We strongly feel that a solution to the problem must be arrived at only through a multilateral approach and not through unilateral extension of exclusive maritime zones.

I do not think that there is any real inconsistency in our approach and I submit that judgment on this point be withheld until we submit a detailed proposal on the fishery problem.

Professor VISHWANATH MORE. It is suggested by one of the panelists that the examples of outer space and Antarctica cannot offer relevant and useful analogies in the development of a suitable regime to regulate the ocean resources. My observation and that of several other scholars in this area is, however, different. I think the history is clear about the parallels in the development of outer space and Antarctica on the one hand, and the ocean uses on the other. Therefore, the suggestion is rather disturbing.

Mr. STEVENSON. I did not say that our experience with outer space and

the Antarctica problems is not relevant in the case of resolving issues relating to the ocean uses. Perhaps in some respects the kind of common approach adopted in those cases is relevant here. What I indicated, however, is that the latter poses much more difficult problems. In the case of the oceans there are many economic rights and vested interests that need to be carefully resolved.

Mr. PATRICK H. MITCHELL. I would like to ask Mr. Oxman and Mr. Ratiner a question: Why, in view of the fact that nearly one fourth of the world's nations are landlocked, is so little attention given to these countries' interests in the U.S. proposed seabed treaty?

Mr. OXMAN. The basic interests of landlocked countries in respect of the exploitation of seabed resources will raise two questions: one is going to be access to seabed resources for their physical exploitation by its nationals, and the second relates to participation in the benefits. In most of the cases the landlocked countries are also developing countries. As such, I believe, in the near future the question of participation in the benefits becomes more important than the question of access to the seabed resources. If we are considering the question of participation in the benefits, we have to note the sources from which such benefits would flow. Offshore petroleum resources are mainly to be found in the continental margins. Therefore, the United States draft, by proposing a narrow limit for the continental shelf, in fact maximizes the international area from which greater benefits would flow to all the members of the international community, including the landlocked countries. There is another provision in the draft according to which, on the Council of Twenty-Four states, two members must come from landlocked or shelf-locked countries.

It could also be argued on behalf of the landlocked countries that they should have a superior right in the area beyond national jurisdiction, because they have no national jurisdiction over continental shelf resources. Such an idea has already been touched upon in the General Assembly of the United Nations. There was quite a stir on this point and the majority of nations might not accept such thinking. As a matter of reality, if one is to get support for any ocean regime, one has to emphasize the interests of coastal states, which are more numerous and in a stronger position than the landlocked states to upset a regime that does not adequately reflect their aspirations.

I must also point out that the landlocked countries, which constitute a potentially powerful voting group, have not made their full possible influence felt on the process of negotiations. This is evidenced by the fact that the African Continent, which has the largest number of landlocked countries, is represented by only one landlocked country in a committee of 86 nations. In seeking a treaty that would provide greatest possible justice to all, one must nevertheless take into consideration which countries are manifesting the most interest in the negotiation of the treaty.

Mr. RATINER. I know of no other proposal put forward in the United Nations, either formally or informally, which does more to promote landlocked and shelf-locked countries' interests than the United States proposal. As Mr. Oxman put it, the landlocked and shelf-locked countries,



together numbering more than 40, would constitute a powerful voting group. By 1973, one should expect that these countries' demands would become more significant, and important enough so that for a successful completion of a treaty on the seabeds their interests will have to be taken into account by the United States and other countries.

The CHAIRMAN then invited the panelists to make final concluding comments on the discussions.

Mr. STEVENSON. I have not always been able to agree with Mr. Alan Beesley. We have strong concern about unilateral claims. The more we wait, the greater these claims would be, and it becomes that much more difficult to reconcile them through multilateral modes. So I believe I would rather go to the 1973 proposed conference on the law of the sea without the most perfect preparation in the world than have it postponed.

Further, today's discussions also seemed to give the impression that there are more differences in approach than is really the case. Mr. McKnight referred to the Senate Subcommittee's report and to the report of the National Petroleum Council. I do not have time to go into all the points of agreement, but it is not a question of disagreements alone.

One other point is, as Mr. Alan Beesley pointed out and as many of the members of the U.N. Seabed Committee noted, that, while one may not agree with all the details of the United States draft treaty, it certainly raised all of the questions that need to be considered. As the United States Government itself pointed out, that is a vitally important purpose of the effort behind its treaty. Because in a democracy the only fair way is to put forward a document like this and let everyone comment on it, so that when it comes to final decision-making, these views may be given proper consideration. I assure you all that the United States Government is giving due consideration in this respect to all the comments made on its treaty in this country and elsewhere in the world.

Mr. OLMSTEAD. I would like to address myself to one question raised by Mr. Oxman regarding the future potential of petroleum resources and the energy needs of the United States. I do not think that anyone can accurately estimate what those needs may be some years ahead and the capacity of any resources to meet them. However, I might give a few statistics which may prove a bit helpful on this point.

The American continental shelf provides one sixth of the oil and gas consumed in the United States today. It is fair to say that offshore production is growing at a faster rate than the onshore production. Regarding offshore resources, about 700 to 800 billion barrels of oil and 16,000 to 22,000 trillion cubic feet of gas are estimated to be in place in the seabed up to a depth of 200 meters. Beyond that depth and up to 2,500 meters, the United States Geological Survey estimates an equal magnitude of reserves. All of these reserves may not be recoverable. Even discounting these figures drastically, we will probably have a greater potential in offshore areas of this country than we have remaining in onshore areas. For example, the onshore reserves are estimated to provide only 100 billion barrels of oil. This number includes the oil produced heretofore in the United States and also takes into account the known reserves in the United

States ex Alaska. I think these figures give an idea of offshore potential and these reserves will make a substantial difference in our ability to meet the future energy needs of the United States.

Finally, I think the U.S. draft, as Mr. Stevenson noted, has certainly helped to provoke a wide range of views. I think that is the way to organize a consensus which would hopefully reconcile and accommodate the divergence of interests and views. Frankly, I do not think it is difficult to harmonize these differing perspectives. As to the words "sovereign rights," I do not believe it is language we are necessarily wedded to. What we have to achieve, however, is a careful definition and limitation of jurisdictional rights relating to offshore minerals so that those rights do not come into conflict with other uses of the oceans.

The landlocked countries can always take leases to explore an offshore area under the existing system. Even if a deep ocean area is created, landlocked states and shelf-locked states are quite capable of participating in the exploitation of the resources in that area, under the flag state jurisdictional approach. Consequently I do not believe it is necessary to have a complicated procedure to protect the interests of those states.

The CHAIRMAN in his concluding remarks did not wish to recapitulate the major points which had emerged from the preceding discussion on the subject. Instead, he chose to submit to the Panel his own perspectives on the different claims put forward in connection with the reformulation of policies and prescriptions concerning the regulation of offshore resources exploitation.

For any useful examination of the contemporary world public order of the oceans and for any relevant exercise in reformulating structures of authority and control, the basic starting point has to be the identification of the common interests of the world community. These interests would include, as one starts from the shore and moves out across the oceans, the security of coastal states. The security of coastal states includes more than their efforts to control the exploitation of offshore resources. It includes their concern to control all kinds of activities conducted off their shores that might endanger their internal community processes. The optimum common interests would further demand the greatest production and widest possible distribution of all values derivable from the oceans among all the members of the world community.

Once common interests are identified, an economic analysis of the issues would demand a distinction between the production of values or benefits and the distribution of the values or benefits so created.

The production of values might proceed by two very different emphases in the allocation of authority: exclusive and inclusive.

The first emphasis would recognize the competence of the coastal state, or other states to establish exclusive authority over the seabed and its resources. The second emphasis would reject permanent, exclusive appropriation and require exploitation under more inclusive authority. The first emphasis in one version would permit the indefinite extension of a coastal state's exclusive authority and control over ocean resources up to a point in the middle of the ocean, where states might meet each other.

Under this approach the seabed riches would be divided among a few states. This kind of a system of regulation of ocean resources exploitation is generally not regarded as in the common interest of the world community. Apparently nobody gives any serious consideration to it.

Another alternative under the first emphasis would be to honor random exclusive appropriation, a "catchers keepers" policy on the basis of effective occupation. This method, if accepted, would initiate a "rush and grab" situation, and the oceans would soon become a source of conflict for the establishment of new domains of sovereignty. Quite obviously this alternative would not promote the common interests.

The second emphasis, that upon inclusive competence, can be divided into two sub-categories: unorganized and organized.

An unorganized inclusive access to ocean resources might treat such resources like fish and allow participants to stake out claims for limited competence over identifiable and finite submarine areas for the purpose of exploitation. These claims would be distinguishable from claims of sovereignty. It is important to note this difference, and not to confuse this modality with the comprehensive permanent exclusive appropriation indicated above. Once claims are recognized, the participants could proceed to exploit the resources in accordance with international law under the supervision and control of states. Such an arrangement has been available to the world community for the last three hundred years and has admirably regulated the freedom of navigation, international communications and the freedom of fishing on the high seas. The same kind of arrangement could be extended to the exploitation of deep-sea mineral resources. Of course, such an arrangement would require states to prescribe and apply appropriate mining laws. These would require, after the fashion of mining policies and prescriptions applied around the world, that the participants define the area of operation as clearly as possible and that they commence exploitation of the designated resources within a reasonable time. There need be no particular difficulty in articulating a system of inclusive access to oceans' mineral resources, without the necessity for vesting comprehensive competence over the process in an international organization.

The organized inclusive exploitation of resources could, under certain circumstances, be more economic and abundantly productive. The United States Draft Convention as it stands today represents one possible form of such organization.

Any choice between an unorganized and an organized inclusive access to ocean resources must of course depend on the kind and quality of the organization states can negotiate. For lack of adequate information on trends in negotiation, I would defer my judgment on choice.

Whatever the degree and modality of exclusivity or inclusivity of access to resources that may be agreed upon, the problem of the distribution of the values so created is very different. Proposals for allocating a certain percentage of the ocean's wealth for the benefit of the developing countries or for the support of United Nations' operations can be considered on

their own merits without their intermingling with considerations relating to the modes of production.

The question where should we fix the outer limits of the continental shelf is independent, but related. From the perspective of existing expectations of the world community, as influenced by the legislative history of the Continental Shelf Convention and subsequent practice and communication, including the recent *North Sea* cases, there would appear little doubt that a coastal state may assert, as exploitability permits, exclusive authority and control over deep seabed resources as far as the natural prolongation of its coast extends. Existing expectations in this regard are, however, one thing and the evaluation of a desirable policy for determining the outer limits of the shelf is something else. There is no inherent sanctity about deference to the natural appurtenance theory. The genuine policy question is by what modality the common interests of the world community can best be served.

In sum, choice even on the outer limits of the continental shelf must depend upon the kind of international machinery we can negotiate. If we can negotiate an international machinery adequate to ensure to coastal states their security, to provide for responsible and balanced participation on an inclusive basis, and to afford promise for an enhanced and economic production of values with equitable distribution among all the peoples of the world, then common interest could suggest drawing the outer limits of the shelf a little closer to the shores.

If one takes note of the contemporary realities of the divided world arena, the prospect of negotiating such an international machinery does not appear bright. I suspect that while the United States Draft Convention may offer hope to landlocked countries, it may be difficult to get for it the support of the developing countries. Consequently, despite all the present confusions and efforts to reformulate the public order of the oceans, the world community may still be forced to rely on the age-old doctrines of the freedom of the seas and their corollaries, and the continued development of customary law to regulate the exploitation of the deep ocean resources.

The session adjourned at 11:45 p.m.

### **The Future of South West Africa (Namibia)**

The session convened at 8:30 o'clock p.m. in the Federal Room of the Statler-Hilton Hotel. Dr. FRANCIS O. WILCOX, Dean of the Johns Hopkins University School of Advanced International Studies, presided.

Dean WILCOX. I would like to introduce the first member of the panel, Clifford Hynning, who is currently in private practice in Washington, D. C. He holds a Ph.D. from the University of Chicago, a J.D. and an LL.M. from Chicago-Kent College of Law. He has served in a number of capacities in the Federal Government, and his primary area of interest is private international commercial investment. He will speak first on

this very important and interesting problem, the future of South West Africa. Mr. Hynning.

## THE FUTURE OF SOUTH WEST AFRICA: A PLEBISCITE?

*By Clifford J. Hynning \**

Members of the Panel, members of the Society, Ladies and Gentlemen:

South West Africa is in southern Africa, south of Angola, west of Botswana and north of the Republic of South Africa and facing the Atlantic Ocean. It is about twice the size of the State of California, 318,000 square miles, and has a population as of 1970 of 749,000. It is, without doubt, the most litigated piece of real estate in international law. The fifth case in The Hague is the proceeding now going on there and about which I hope to say very little. It really is the Eliot five-foot Library of international law: it was there in 1950, 1955, 1956, 1960 to 1966, and from fall of 1970 to the present time. I think it illustrates the limitations of international adjudication. For despite all this litigation over two decades, there is apparently at hand no solution which is satisfactory to either the Republic of South Africa or to the outside world, except for the fact that South Africa is in control of the area.

### *Common Ground with Mr. Gross: No Military Coercion*

I said to Mr. Gross, before we started, we do have some common ground, although I will be speaking more from the side of South Africa, as a private lawyer. But the common ground is stated very eloquently by him in his recent communication to the *Washington Post*,\*\* and I would like the Chairman's indulgence to be permitted just to read two sentences: "Few," he says, "if any, responsible persons would advocate the use of outside military force to 'coerce South Africa out of South West Africa' to use Mr. Acheson's phrase." That is "coerce South Africa out of South West Africa." I think as long as this is realized, it is possible for us here this evening to discuss various solutions that have a little more practicality about them than if one contemplates, as some people do, the use of military force against South Africa. Mr. Gross makes one other statement, which I do not go entirely along with, but I go some way with him, and that was that the international community "must bring to bear all practical measures, short of force, with the hope of inducing, even if it cannot compel, necessary changes." Certainly I agree with the idea that you cannot compel change. I also want to introduce a little word of warning about inducing; it is like a man trying to induce a woman to do something or vice versa. If you are too persistent and too heavyhanded,

\* Of the District of Columbia Bar.

\*\* "The Pledge to South West Africa," March 18, 1971, editorial page.

you know what happens. That, I think, is our common ground at the outset. I am using Mr. Gross's words; he may think I have changed their meaning, but I hope not.

The policy of South Africa has been for many years a policy called the Homelands Policy in which it has divided the area of South West Africa into various divisions that it calls the homelands of the Non-White population. South Africa contemplates, and has said so from the very beginning and speaks increasingly so, that these homelands will have the right of self-determination, to fix their own independence. It is my own opinion, although I cannot at this stage point to any document emanating from the Republic of South Africa, that such independence will be achieved in this decade, that is in the '70's, in the Republic of South Africa, the Transkei, and that this will be quickly followed by some independent areas in South West Africa, such as Ovamboland. That is just an opinion.

### *Tried Solutions*

The solutions that have been attempted in dealing with the area of South West Africa are many. The first solution, which most of the world has favored, was *United Nations trusteeship*. This was proposed initially in 1946 and rejected by the Republic of South Africa on the ground that it was not acceptable to or consistent with the expressed views of the inhabitants, which had been surveyed in 1945/46. The Court in the 1950 Advisory Opinion held that South Africa had a perfect right to refuse to enter into negotiations for a trusteeship. South Africa had a second reason why a trusteeship would not be practical, and that is, this area contains at the present time a white population of 90,000 who are a very sophisticated people with a substantial area of self-government. To put that under United Nations trusteeship would present singular problems.

The second solution was *annexation*. This was proposed also in 1946 and was rejected by the United Nations (General Assembly Resolution 65 (I)) on the ground that the inhabitants, and I am now going to read again to be sure I state it accurately, the inhabitants had not "reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation"—another word for annexation—"of their territory" into the Republic.

The third solution was *partition*. This was proposed by South Africa in 1957 to the Good Offices Commission (established under General Assembly Resolution 1143 (XII)) consisting of the United Kingdom, the United States and Brazil. The Commission proposed that the northern part of the Territory, including approximately half the population, would become a United Nations trusteeship and the remainder would be annexed into the Republic. This was summarily rejected by the United Nations on the ground that any United Nations trusteeship had to include the entirety of South West Africa (General Assembly Resolution 1243 (XIII)). That led to the impasse that has prevailed since then.

### *South Africa Proposes Plebiscite to the Court*

At the opening session of the Court in The Hague in February of this year the Government of South Africa made a somewhat daring proposal. This was a proposal for a plebiscite to be held in South West Africa under the joint supervision of the Republic and the World Court and that, if such a plebiscite were held, it would eliminate many of the issues then pending before the Court, particularly those issues that arose out of the condemnation of the Republic of South Africa for oppression, illegal occupation, defiance of international authority. It was the argument of South Africa that if you took the views of the inhabitants in a fairly held plebiscite, to be worked out in detail with the Court, that would furnish an answer and perhaps resolve the issue once and forever.

The Court has not formally ruled on this; \* I think that the longer the delay, the less likely it is that the Court will accept the idea of the Court holding a plebiscite jointly with the Republic of South Africa. It may be that some judges in their opinions are going to comment favorably on the idea of the plebiscite and perhaps follow the suggestions of Jack Stevenson in his very brilliant argument to the Court on March 9, 1971; he suggested that: "the question of holding a fair and proper plebiscite under appropriate auspices and with conditions and arrangements which would ensure a fair and informed expression of the will of the people . . . deserves a study." The Court may indicate in its advisory opinion \*\* to the United Nations that it deserves study. The political organs of the United Nations could "request the Court to play a rôle in any plebiscite arrangements, the Court could then consider whether it can appropriately participate in such arrangements." And he mentioned the precedents of Tenda-Briga in 1947, and the French settlements in India in 1949, where officers of the Court, though not the Court itself, appointed observers to attend the plebiscites.

Another alternative under the plebiscite would be to have a *United Nations administration of the plebiscite*. In my opinion, this is the road of no return. The plebiscite has to be held, I think, outside the United Nations to be acceptable to the Republic of South Africa. Why do they take that position? They take that position because of the repeated number of overwhelming votes against South Africa by the United Nations, the pronounced hostility towards South Africa by the Secretary General, and because of the indications that are now current in the United Nations as to the nature of a plebiscite for South West Africa. For example, the representatives of organizations representing petitioners from South West Africa, like SWAPO, have said that there could be a plebiscite, so long as the plebiscite did not question the validity of the United Nations resolutions. This reminds one somewhat of a vote in the Soviet Union or the Communist territories where you can vote "Da" but you cannot vote anything else. The issue at hand really must be: Do you want United Nations administration or do you want South African administration? If the vote

\* Request by the Government of South Africa rejected by the Court on May 14, 1971.—Ed.

\*\* Rendered June 21, 1971.

is to be only one way, there is no likelihood that such a procedure would be agreed to by South Africa. So, it is my opinion that a plebiscite has to be worked out either in conjunction with the Court or under some other international auspices than the United Nations. If that were done, this might be a forward step in resolving this issue, provided that it were a fair and reasonable plebiscite.

What do I mean by a fair and reasonable plebiscite? I think there has to be first a *real choice* placed before the voters. They must have a choice between United Nations administration with independence in a short time, as soon as they are ready; that would be one choice. The other choice would be continuation of the present policies of South Africa of the homelands policy with eventual independence, possibly in the same time period for certain areas. And a third choice might be annexation, such as the white area, into the Republic. But there has to be a real choice, not this kind of SWAPO proposal that nothing is to affect the validity of the United Nations determinations.

The second element of a fair and reasonable plebiscite is that *reasonable time* must be afforded to both sides, or all three sides, if there are three sides, to present their point of view and to make this understood by the local inhabitants. This is going to take some time, not too long a time, because if you have electioneering going on for months, you are going to disrupt the economy, politically and economically, and that would be wholly unacceptable, I am sure, to the administering authority of South Africa. There has to be a delicate balance here as to how long it is necessary in order to educate the inhabitants of South West Africa to what the United Nations choice means; they pretty much know what the South African choice means.

The third is the determination of a *voters' list*. Here I think the problem is relatively simple. Under South African law anyone over 18 years of age can participate in local voting; in the case of a national election, of course you have other restrictions. But on this issue you could start with the general franchise law of South Africa and include the entire adult population. The other provision that may be of use is that South African electoral laws provide for absentee voting. Clearly on such a choice as this the exiles or refugees must be afforded a reasonable opportunity to participate or otherwise the fairness of the plebiscite would be subject to the criticism just made, that it was nonsense. But if anyone who has a *bona fide* connection with South West Africa—and these people can be identified without much difficulty—can be permitted to participate in the electioneering and in the voting, it would seem to me that you would have a fair chance of getting the views of the people.

The next point is we should have a *ballot* printed in the various native languages and in English and Afrikaans and they should also make use of symbols so as to deal with the problem of inability to read. There should be assurance of fair provision of *communication* and *transportation*. Lastly, since this plebiscite is not going to be conducted under third-party supervision but it will be conducted (under my proposal) under the



existing authority, it should be thrown *open for foreign observers* to watch and see that this is a fair plebiscite. I would like to see if Mr. Gross thinks a plebiscite offers some prospect of moving forward on the very difficult problem of South West Africa.

The CHAIRMAN. Thank you very much, Mr. Hynning.

The next speaker is an old friend of mine, Ernest A. Gross, who is currently in private practice as a partner in the law firm of Curtis, Mallet-Prevost, Colt & Mosle. He holds degrees from Harvard University, and has held a number of very important positions with the United States Government, most notably serving as Assistant Legal Adviser in the Department of State and then later as Assistant Secretary of State with the United States Department of State. It is a privilege to present him to hold forth on the other side of this problem.

### REMARKS BY ERNEST A. GROSS \*

Mr. Chairman, Mr. Hynning, distinguished guests:

I will come to the question of plebiscite toward the end of my remarks because it really has nothing to do with what we are talking about this evening, as I shall show.

I want to start with the piece of real estate, as Mr. Hynning has described it. This piece of real estate, as he so accurately said, has been the subject of unprecedented litigation and is the only area on the surface of the earth over which the United Nations has assumed a direct responsibility of administration. This unprecedented situation obviously has a background and a history none of which has been referred to by Mr. Hynning this evening. Thus I invite your attention first, to principles; and, before coming to the question of how the will of the people of the Territory might be ascertained, I think we should discover what it is that, over the last twenty years—actually I will say fifty years because the Mandate was set up in 1920—has been the characteristic of the administration of this piece of real estate by the Government of South Africa. I think that in examining the principle underlying what we are discussing this evening, the future of the Territory of South West Africa, now usually known as Namibia, we should consider it in terms of people and not of real estate. The Covenant of the League of Nations and the Mandate itself laid a trust upon the international community, first through the League and then through the United Nations, to accept a responsibility to bring a people to a condition in which they could exercise sovereignty over their own territory in conditions to which they have been brought by a Mandatory Power given, what is called in a quaint phrase of 1920, a “sacred trust of civilization.” The Mandate laid upon that administering authority no more simple a responsibility than, and I quote from the Mandate, “to promote to the utmost the material and moral well being

\* Of the New York Bar.

and the social progress of the inhabitants of the Territory." I think that Mr. Hynning and I must agree that this is at least a suitable place from which to begin our debate and that without stating this elementary, basic proposition we are apt to be deflected by extreme issues such as how the international community is to determine whether or not the people of this territory have been deprived of the opportunities, the growth and development which it was a sacred trust of the Government of South Africa to carry into effect. In his haste to discuss procedures now proposed by South Africa for ascertaining the will of the people of South West Africa by referendum—people who today have no right to vote or to participate in the processes of their government—Mr. Hynning has omitted the basic reasons why the United Nations felt constrained to take the unprecedented step of assuming direct governmental responsibility for the Territory. It did so in October of 1966 because of the fact that the Government of South Africa had been found by the United Nations and by the International Court of Justice to have failed to comply with its responsibilities under the Mandate. These numerous pieces of litigation to which Mr. Hynning casually referred, as if they were normal litigation between two equal parties, in fact involved bringing before the bar of the international community the activities of a trustee over a population, which the Court and the United Nations have found to constitute a betrayal of the Mandate. Specifically, the violations included refusal to report to the United Nations concerning its conduct in the administration of the Territory. In addition, the United Nations, in approximately seventy resolutions adopted over two decades, has found with virtual unanimity (not, as the South Africans repeatedly say, as a "political conspiracy") that the South African Government has committed material breaches of the Mandate by its policies of official racial discrimination in the Territory. Mr. Hynning has not referred to this vital matter, in any serious vein.

It should be borne in mind that the population of the Territory is composed of something close to half a million people, of whom 82% or thereabouts are classified as Black, Native, non-Whites; 14% are European; and approximately 4% are so-called Coloreds, the products of White and Black marriages over generations. The Police Zone, which is the name originally applied by the German colonial empire, and retained by the South African empire, is two thirds of the Territory and comprises the mineral-rich agricultural plateau land. This produces the major wealth of the Territory. Blacks are accorded the privilege of working. Their labor keeps the modern economy alive and thriving; but they are given no rights to vote, to participate in political processes affecting their destinies. It is a strange commentary on the zeal with which a project of a plebiscite is suggested that they are given no right to organize or bargain collectively to improve their condition. They cannot move from place to place without permission and are subject to the infamous pass system. Restrictions are imposed upon their advancement to positions of supervision over Whites, which is made a misdemeanor. Their education opportunities are limited to an extent whereby, over the history of the Man-

date, some fifty years now, only a handful of Blacks have qualified for college admission. The budget for White education is twice that of the budget for Black education, despite the fact that the Black students exceed the Whites by at least 100%. One finds it strange to hear a discussion of the future of the Territory of Namibia without adverting to these points. It is true, of course, that the United Nations, as Mr. Hynning has pointed out, has been guilty of repeated overwhelming votes, as he put it, against South Africa. This very fact of overwhelming votes against South Africa is cited as a reason for not permitting the United Nations to conduct the administration of the Territory. I think that the logic of this proposition is difficult to accept. With regard to the subject of the plebiscite, it is sufficient for the present purpose to close my remarks with the verdict of the United Nations Council for Namibia on this question, since the Court has not passed on it yet.\* The Council rejected the idea of the plebiscite. The Council objected to the idea of the plebiscite proposed by South Africa to the Court because, as the Council said, the issue at stake is the independence of Namibia and not whether the Government of South Africa or the United Nations shall administer the Territory, which is the question proposed by South Africa. The United Nations' decisions in this matter are aimed at achieving the independence of Namibia and not its administration by the United Nations, except for a brief transitional period. It was fifty years of misrule by the South African Government which led the people of this Territory away from, rather than toward, independence and that constrained the United Nations, as a matter of outrage and frustration, to take the unique step of asserting a direct responsibility of government for this area, and this area alone on the surface of the earth.

The CHAIRMAN. Thank you very much, Ernie. The stage is now set for the two discussants and I call first upon Adriaan Eksteen, who is presently the Second Secretary of the Embassy of South Africa here in Washington. He graduated from the University of Pretoria. He has served in the South African Government in a number of capacities in the Ministries of the Interior, Justice, and Foreign Affairs. He has been in this country for the past three years with the South African Embassy, and I am pleased to have him present his views on this problem now.

### COMMENTS BY J. ADRIAAN EKSTEEN \*\*

Thank you, Mr. Chairman. I think Mr. Hynning has already told you where South West Africa is situated so I don't have to repeat that. There are certain remarks of Mr. Gross that I would like to come back to, but first of all I would like to start my address here by noting the approximate area of South West Africa. The area is approximately 318,000 square miles; that equals the area covered by the States of Texas and Louisiana.

\* Decision given May 14, 1971. Advisory opinion delivered June 21, 1971.—Ed.

\*\* Second Secretary, South African Embassy.

In the territory of South West Africa, apart from the topographical and climatic diversities, one is immediately struck by the heterogeneous nature of the population of about 750,000 people. If you look at the population of the City of Dallas or Boston you will find that that is about the same as the population of the whole of South West Africa.

This diverse population comprises a total of twelve different ethnic groups such as the Kavango, the Ovambo, and the Koakolandars in the north, the Bushmen, the Hereros, the Damara, the Nama, the Caprivians, the Coloreds, the people of Rehoboth, and then the Whites. When each one of these groups is carefully considered, one is struck by the fact that each group differs greatly from the other in respect of appearance, ethnic stock, territories of origin, language, culture, religion and general level of development. On the one end of the scale of development are the nomadic Bushmen, scattered in small family groups with no political organization at all; on the other end of the cultural scale is the White group with its settled existence and highly organized modern institutions, political, social and economic. The other groups, intermediate between these two extremes, vary considerably. A good example is the Ovambo who constitute about 46% of the total population of South West Africa. The Colored population of the territory again poses entirely different problems from the groups considered above. A relatively small minority, it is in itself divided into two sections.

The problem for the South African Government was, then, how to conceive of a policy which would allow all these peoples to live in harmony and in peace with each other. Because people wish to run their own affairs with a form of government which fits into their own particular customs and way of doing things, the South African Government thought it wise to build its policy of separate development on these principles. In pursuing such a policy, one secures for the peoples freedom but at the same time ensures the retention and preservation of their own cultures, customs and languages. The people of each one of these national groups are now able to develop to the maximum of their abilities without undermining the development of other national groups, but with the possibility for all of them to live together in circumstances of friendship and co-operation. These circumstances can be achieved only when policies are pursued which are based on full recognition of human dignity of all the peoples. Although the situation and the problems attached to it, are difficult and although no solution can be said to be perfect, steady and substantial progress has, in fact, been made in South West Africa. The peaceful coexistence of the peoples in South West Africa stands in sharp contrast to the tension, violence and bloodshed which riddle certain other parts of the world. In South West Africa a peaceful, evolutionary progress is continuing, despite enormous diversity, adverse natural conditions and the incitement from outside. Despite all the efforts by foreign instigators to counter them, South Africa's policies enjoy the support of the overwhelming majority of the territory's peoples and are achieving increased success in bringing satisfaction to them.

The political development of all the different peoples is at different stages. At the request of the Ovambos, the South African Government has established a Legislative Council for Ovamboland which consists only of Ovambos representing their own people. The same development is on the way for the Kavango while the Coloreds are represented by their own people in their own Council. Through these institutions, the peoples concerned will determine ultimately their own political future.

But also important are the other benefits the peoples of South West Africa are enjoying through the presence of South Africa. These benefits are in respect of health, education, housing, agriculture, provision of water, transportation, and telecommunication. South Africa's efforts in these fields have already resulted in a standard of well-being comparing favorably with the rest of Africa.

South Africa does, therefore, not believe that the objective of self-determination for all the peoples of South West Africa is to be achieved by attempting to force them into one artificial territorial unit to be ruled on the basis of a majority vote. In rejecting this policy, which could only be to the detriment of the peoples concerned, South Africa's views are being strengthened by the unfortunate experiences which followed similar attempts in Africa, Asia and elsewhere at establishing integrated societies in conditions where substantial differences obtained between groups in one geographic area.

The South African Government is as much concerned as any other civilized state about fundamental human values, freedoms, dignities, and justice for all. The very purpose is, therefore, to build up each people into a self-governing entity, capable of co-operating with states in the political and economic spheres in such a manner as may voluntarily be agreed between them. Such an approach is based upon the belief that separate development is the best means.

To conclude, in the political sphere this entails developing institutions of government for each of the peoples concerned, so that when they reach the stage where they are able to control their own destiny, they may negotiate with others on a basis of equality and decide with whom, on what terms, and in what manner—politically or economically, etc.—they wish to co-operate. With a guarantee then that they will be given their independence, once they are capable of controlling their own destiny, they can now already look forward to enjoying complete political independence with economic interdependence.

The CHAIRMAN. Thank you very much, Mr. Eksteen.

I turn now to the final speaker in this Panel, Mr. Allard Lowenstein. Mr. Lowenstein, I think you all know, is a former member of Congress who represented the Fifth District of the State of New York. He holds degrees from the University of North Carolina and Yale University. He has taught at a number of universities, and was foreign policy assistant to Senator Hubert Humphrey in 1959. It gives me pleasure to present Mr. Lowenstein.

## REMARKS BY ALLARD K. LOWENSTEIN \*

If the introduction leaves you wondering how I chance to appear on a panel about South West Africa, I think perhaps I should make one or two additional comments about my sense of the situation and from where it comes. I was a little troubled about being asked to appear because it seemed to me there ought to have been on the Panel a South West African to speak as to how South West Africans feel about the future of their own country. My qualification for speaking here is that I have been to South West Africa and spent time there—not enough time to satisfy any demand that I be an expert, but enough time to understand a good deal more about the new feelings of the African and, generally, the non-White population of South West Africa than most people in this country can. And I did speak as their spokesman at the United Nations before it was possible for South West Africans to escape in sufficient numbers to represent themselves. So I want to make just a few general comments on what you have heard today, with the specific stipulation that I am saying what I believe from my experience is an essential ingredient if you are discussing the future of South West Africa: namely, that the concept of South West Africa having any future is nonsense unless it is determined in accordance with the wishes of the 80% of the population which has been systematically excluded from having anything to say about their future.

The South African Government, if nothing else, as a result of the past twenty years of discussion, has learned to profess to do things which twenty years ago it boasted it would not do. That, at least, is a measure of the fact that they understand that the kind of pretense that was the basis of their policy after the second World War would be so offensive now that if they did not change the pretense, there would be very little that could be done to justify what they say they are doing. But the fact is that, whatever their rhetoric is, they continue in South West Africa to function on the theory that they, the South Africans, have the right to determine what is best, what should be done for the people in South West Africa. And that central fact produces a number of subsequent, disastrous misconceptions, most of which, if you listened carefully, Mr. Eksteen has repeated today on behalf of his Government, although he repeats them now with the phraseology that is consistent as the South African Government thinks the world wants it to be worded. So we hear about how people must be given the opportunity to develop in accordance with their maximum opportunities, people must be given a chance to live in peace and justice, and all the rest of the rhetoric. It sounds straight out of the Mandate when passed 55 years ago. The fact is that South Africa has no business being in South West Africa. That is the simple, central fact that nobody can get away from. They are there only because they were given the opportunity 50 years ago to help to develop South West Africa to its self-government. That, they did not do. That, they, in fact, made no pretense of doing and had they made a

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pretense of doing it, the facts would have made such a lie of the pretense that it would have been awkward. Now they say that they are going to divide South West Africa into an infinite number of separate communities, all of them with self-government, subject to the canopy of South African rule. Who determines who is in which community, who determines who lives where, who determines who runs what part of the country—South Africa reserves the right to decide. And observe, that is the fundamental error of the whole proposition. But since they are not there for that purpose, since they are, in fact, foreigners in South West Africa, the notion that they can decide anything for the people of South West Africa is *ab initio*, unacceptable, and I think one has to proceed from that fact if you want to understand what discussions should be about when you talk about South West Africa.

If, besides the fundamental problem of their having no right to be there, they had not conducted themselves in a way that is about as oppressive as any government ever has been, you might say that the legalism or the technicality that they should not be there can be waived in the interests of the progress they have achieved or the progress they have helped others to achieve. But, in fact, the reverse is the case. I have been to many countries in which there is oppression, but I think it is fair to say that in no country have I ever been where the oppression is so total and so codified in the law. In South West Africa the population, whose country it is, is unable to move about without passes, is unable to obtain employment without permission, is unable even to live with their own families under circumstances of their own choosing. They, as Mr. Gross has explained, have no say in the political or economic decisions of the country. They are subordinated in economic terms to a life which is, in fact, so subservient that it is difficult for even the most ambitious and most talented South West African to have a minimal standard of living that would be comparable to the least competent European. In the country that belongs to the South West Africans, Europeans have a monopoly of economic and political power to determine the future of everybody and to deny people the most fundamental human rights that are accepted everywhere now in the world as being basic, even to the fundamental proposition of people having opportunities to exist in countries that are not their own. When you add all that together, the degree of hypocrisy involved in suggesting that now South Africa should obtain support, in the theory that she is now going to do things in the interests of the people of South West Africa, becomes offensive. And, I think, it is in that context that anybody who wants to understand the discussion of the future of South West Africa has to place his thoughts. This is a country that does not belong to South Africa. This is a country in which the population has been denied the chance to develop whatever institutions they wish. This is a country in which freedom has been so long denied, and so terribly obliterated as a concept between human beings, that unless we begin with the understanding that none of the discussion you have heard from the South African Government has any connection to reality, we can go on

to a sort of cloud, cuckoo land and discuss theory forever with no relevance to the fact of what the future of South West Africa must be. The only answer that you can get, when you make these facts clear, is that South Africa is there, as once was remarked by her representative at the United Nations, by route of conquest and that, of course, is true. South Africa is there now solely by route of conquest. And it may be true that in a world in which force still seems a very effective way of gaining territory, it is very difficult to see how they can be evicted. That problem is, of course, the problem the world faces; and, if we can discuss it rationally, then we have to discuss it in the context of the fact that South Africa—there not by virtue of any commitment to carry out her legal obligations, there not with any moral right or any right by any notion of self-determination that is sacred to most of the world now, at least in principle, there only by right of conquest—plans not to leave. We know in this country, and I suppose most people now understand, that no single nation can, in fact, impose its will on the whole world. So even if this country were prepared to make a decision to use force, it would be, it seems to me, very unwise and very difficult to justify any effort to use force in South West Africa as Americans. Thus we start with certain delineations of the problem and certain limitations about what we can do. And what I would suggest is that Mr. Gross gave the sort of clue to what our attitude should be in the article he wrote for the *Washington Post* in his concluding paragraph. This, I think, is a summary of the whole situation as honestly as I can find it anywhere: "When the United States sought to conserve foreign exchange, it did not hesitate to prohibit all new direct investment in South Africa. Can it be said that measures adopted in order to correct the balance of payment are a gratuitous folly" [which is the phrase that was used by Secretary Acheson] "if designed to address the balance of justice?" Or, in short, it is very difficult to know at this moment how the oppressive and appalling rule of South Africa, in the territory she is using by right of conquest, can be terminated. But it is very clear that we have every obligation in the world as human beings, as Americans, as people concerned about a lawful society and a peaceful world, to see to it that nothing we do condones, or simplifies, or encourages the misbehavior of South Africa in a territory which is, after all, a sacred trust of civilization, if such a concept does not seem so outdated by the behavior of civilization in the last 50 years as to make one smile even at the thought of it. We are faced with the simple fact that South Africa is there, behaving as she is, and that we must respond to it. And I want to urge that, if we do nothing else, we must respond to it in terms that are responsive to the views of the South West African people. Those views are clear and are that they do not want South Africa there. And if there was any problem about those views being clear, South Africa would not, over the past 50 years and certainly over the past 20, have refused the South West African population any opportunity to participate in the political decisions of that country. What I saw when I was there was very clear. It was terror; the common denominator was terror. People



met you clandestinely; they were terrified you would quote them; they were afraid of being seen with you; they understood the problem of being caught talking about their own country with someone who was there from outside that country without permission of the White Government of South Africa, that that invited the kind of retribution which could make it impossible to function. The legal cases that have been brought against South West Africans by South Africa under South African law in South Africa are simple enough evidence that, in fact, these fears are not baseless. So I would urge as the program proceeds that we keep in mind what is the context of the problem. An aggressor has conquered a territory and stays there by that process. We are unable to use force everywhere in the world to meet force for reasons which we all know very clearly, so we must, in the constraints that are imposed by that limitation, use our economic and moral resources as best we can to give encouragement and hope to the South West Africans. Therefore, when the time comes for them to redress these grievances, we will be known to have been on their side and not on the side of their tormentors.

The CHAIRMAN. Thank you very much Mr. Lowenstein.

We are ready now to turn to the interchange in the Panel. I would like to ask Clifford Hynning if he has anything to say to Ernest Gross, to Mr. Eksteen, or to Mr. Lowenstein.

Mr. HYNNING. I have a few things to say, I could say a lot but we have a limitation on time, so I will try to be selective. I was a little startled, I must say, to hear Mr. Gross enumerate all these allegations of oppressive behavior by South Africa against South West Africa when I have in front of me his statement on April 27, 1965, to the World Court. This was in a proceeding in which the pleadings had been that South Africa had oppressed and mistreated the people of South West Africa and violated the Mandate and therefore South Africa should be declared, in some manner, subject to remedial action. This was after a proceeding that had started in 1960: you had had argument on preliminary objections, you had had days of argument and the presentation of witnesses and so forth. The point came as to what was involved in the allegations by Mr. Gross as Counsel for Ethiopia and Liberia on oppression and mistreatment. To the surprise of the Court— I was not there as he was, but I am informed that the President of the Court was quite astounded and that the Counsel for South Africa were astounded when they heard Mr. Gross say: "All facts set forth in this record, which upon the Applicants' [that is, Ethiopia and Liberia] theory of the case are relevant to its contentions of law, are undisputed. There have been certain immaterial, in our submission, allegations of fact, data or other materials which have been controverted by the Respondent [South Africa] and such controversion has been accepted by the Applicants [by Ethiopia and Liberia] and those facts are not relied on. The Applicants have gone further in order to obviate any plausible or reasonable basis for an objection that the Applicants have not painted the whole picture in their own written pleadings. The Applicants have advised Respondent, as well as this honourable Court that all

and any averments of fact in Respondent's written pleading [that is, the denial by South Africa] will be and are accepted as true, unless specifically denied. And the Applicants have not found it necessary and do not find it necessary to controvert any such averments of fact. Hence, for the purposes of those proceedings, such averments of fact, although made by Respondent in a copious and unusually voluminous record, may be treated as incorporated by reference into the Applicants' pleadings." This is found in Volume 9 of the proceedings of the Court, page 21, and occurred on April 27th.

I have spoken to Mr. Gross, at a distance, on why this happened. Here was an international forum where the issues were initially those of oppression, abuse, illegal treatment, violation of the Mandate. Witnesses had been called by South Africa. There were certain petitioners who had testified before the various U.N. groups. South Africa said: "We will pay their traveling expenses to come here so we can cross-examine them." None of these witnesses was called and this quoted statement was made. I do not quite understand how it is possible for Mr. Gross to say that the World Court at any time, up to now, has found that South Africa has violated the Mandate by oppression or things of that nature. It is true that the 1950 Opinion held that they should file reports, a procedural requirement—I think one of the difficulties of South Africa is *that* they regard filing reports more important than we do in this country—and second, they had not forwarded petitioners' complaints. I am unaware of any finding by a majority of the World Court in 1950, 1955, 1956, 1966, that says South Africa oppressed, mistreated the population or violated the Mandate. This issue has appeared in the current proceeding with allegations found in the U.N. resolutions. South Africa has requested of the Court an opportunity to examine into that on a factual basis, which request is still pending. South Africa made another proposal in 1966: that the Court should travel down to South West Africa and look at South West Africa, and should also travel to Ethiopia and Liberia and a couple of independent countries. That was very strongly opposed by Mr. Gross as not essential to the case.

As Mr. Lowenstein concluded—I think perhaps his eloquence carried him away—he referred to South Africa as conquering South West Africa as an aggressor. I do not know what he is talking about. South Africa came into South West Africa under a joint British/South African command in World War I, the war against Imperial Germany. This was German territory and it was taken over by South African forces acting in concert with the Imperial Command in London for that purpose. South Africa has been an ally of the United States in World War I, in World War II, and in Korea, and I find it fantastic to have her referred to as an aggressor in South West Africa. We may find a lot of quarrel with what has happened there, but you cannot use the word "aggression" in my opinion.

The CHAIRMAN. Thank you, Mr. Hynning. I will call on Mr. Gross, now, if he would like to query any member of the panel or to raise any point about any of the matters that have been discussed up to this stage.

Mr. GROSS. There are several points I do feel obliged to make.

With regard to the contentions of the applicant states before the Court, to which Mr. Hynning has referred, the proposition was extremely simple. It was that out of the mouths, out of the legislation, out of the regulations of the South African Government, the policy of official racial discrimination clearly and unequivocally appeared; and the policy of official racial discrimination was contended by us, the applicant states, to be as a matter of law, as a matter of standards accepted by the international community, a clear violation of a Mandate obligation to promote the welfare and social progress of the inhabitants of the Territory. We were prepared, as we did, to accept, by way of argument, every contention made by the South African Government for the purpose of the case. As we said, our contention of illegality rested on a legal proposition—although the Court never got around to a judgment on the merits—that the avowed, undisputed policies of official racial discrimination pursued by the Government of South Africa in the Territory was, as a matter of law, a violation of the Mandate. We submitted that no argument or contention of South Africa in the proceedings, even accepting them at face value, rebutted the legal proposition that their admitted policies and practices violated the Mandate. The sort of thing we had in mind, for example, I quote a sentence from an official South African publication: “The White nation of South Africa and South West Africa must stay as a White African nation.” As we said to the Court, as the United Nations has said by overwhelming majorities, this proposition is *per se* incompatible with the obligations of the Mandatory in South West Africa. This is not a “White nation”; it is a nation composed 80% of non-Whites.

The second point I would like to make is that the discussions by Mr. Eksteen with regard to Ovamboland and other areas of the Territory avoid the issue, as is traditional with the arguments of South Africa before the world, before the United Nations and before the Court itself. The situation in what is called the Police Zone, the two thirds of the Territory that comprises the modern economy, is that Blacks have no rights of residence except on the basis of work, Black residents are separated from Whites by a mandatory buffer strip of 500 yards, Blacks have no legal right to vote or to organize or to bargain collectively. Ovamboland, the other area to which Mr. Eksteen refers, is the marginal subsistence area, where the Blacks live, but from which they are drafted to work for the Whites in the so-called “White economy” under the restrictions which have been mentioned.

And finally, with regard to the question of South Africa’s right to the Territory by conquest. That argument, made by the South Africans in the Court and before the United Nations, is that South Africa had occupied the Territory in the first World War as a matter of conquest, and that even though they have disavowed the Mandate, they insist on the right to control and administer the Territory on a basis that they had occupied the Territory by conquest. The Court itself in its Advisory Opinion has said, and it repeated again in 1962, that the South African Govern-

ment's right in the Territory are based solely upon the Mandate and that, if the Mandate were terminated, South Africa had no rights in the Territory. What Mr. Lowenstein, I am sure, was referring to when he referred to aggression, is that since the resolution of the General Assembly of October, 1966, South Africa is illegally, aggressively in possession of the Territory without right or warrant, and that, by use and threat of force, it is coercing the United Nations from carrying out its obligations in the Territory.

The CHAIRMAN. Mr. Eksteen, do you have a further comment you would like to make? Or any questions?

Mr. EKSTEEN. Yes, I would like to address two questions, very short ones, to Mr. Lowenstein. The first one is, if he can tell us when was his first visit to South West Africa and when was his last visit to South West Africa and also how long each visit lasted. It seems to me that Mr. Lowenstein was in South West Africa long enough to write a book. It is called *The Brutal Mandate: A Journey to South West Africa*. In this book Mr. Lowenstein described his meetings with so-called oppressed people in South West Africa, viz., Hans Beukes—I should also like to know when Mr. Lowenstein last saw Mr. Beukes—and others like Hosea Kutako, Marcus Kooper, Kozonguizi, Michael Scott, Mburumba Kerina and others. Then on page 154 of his book, and you will permit me to read just one short paragraph, Mr. Lowenstein referred to his presentation of the South West African case before the Fourth Committee of the General Assembly of the United Nations, and said:

Fortunately, mine was a small part of the presentation. Mburumba Karina (that is one petitioner) gave a striking résumé of South Africa's violation of legal obligations, and Kozonguizi (that's another petitioner) submitted a mass of detail about the daily life of non-Europeans that culminated into one of the most impressive indictments of the policies of the Union (i.e. South African) Government ever offered by the United Nations. Hans Beukes' (that's another one) testimony provided the committee with its first first-person information about the position of the colored population of South West Africa.

It is obvious that Mr. Lowenstein was only relying—and I believe still relies—on what the petitioners told him in South West Africa and what they told him at the United Nations.

Now, to come back to Mr. Gross and to the case of Ethiopia and Liberia against South Africa in the International Court of Justice. When Mr. Gross submitted his first written pleadings to the Court, the Memorials, he quoted at length from statements by petitioners to the Fourth Committee. Then South Africa took the trouble in its Counter-Memorial to refute every one of the allegations. When Mr. Gross presented his second and last written statement to the Court, the Reply, there was not a single reference to any petition or to any petitioner in that whole Reply. I want to ask Mr. Gross: "Why all of a sudden this omission to reference to petitioners?" But maybe we can get an answer when we look at the record of the Oral Proceedings of 1965. When Mr. Gross was confronted

with the South African question about the statements made by the various petitioners, he said that the Applicants (Ethiopia and Liberia) had intimated that they had not "relied upon the accuracy of statements in such petitions," but that they had cited the petitions for the bearing they might have as confirmatory of the reasonable predictable consequences of South Africa's policies. The logical and certainly the most reasonable conclusion to be reached from such a statement would be that if the petitioners cannot be believed, their statements cannot be relied upon as confirmatory of anything. Furthermore, if the petitioners' allegations were true—and according to Mr. Lowenstein there is no doubt about their soundness—it was surprising that South Africa's accusers did not jump at the golden opportunity which South Africa provided Mr. Gross, and to which Mr. Hynning referred, when South Africa indicated that she would consider, if the Applicant States should wish to call the petitioners as witnesses, whether South Africa ought not to pay their witness' fees to come to The Hague so as to allow South Africa the privilege of cross-examining them before the Court. Nothing came from it.

Now, if I can conclude, I wish to draw Mr. Gross's and Mr. Lowenstein's attention to what a Russian representative once said in the Fourth Committee, the same committee before which Mr. Lowenstein testified. On May 4, 1967, the representative said à propos of what Petitioner Ngavirue of the South West African National Union had to say. I quote from Document A/C4/S.R. 1680, page 4: "The political adventures which the South West African liberation movements exploited for their own personal interest could never count on the support of the Soviet Union." If they can't count on the support of the Soviet Union, I would like to know on what support they are going to count.

Mr. LOWENSTEIN. My last time in South West Africa was in 1959, not because I would not be delighted to go back to South West Africa but because I am prohibited from going back to South West Africa. It is my experience in this world that when people do not let you go and see things, it is because they are afraid that you will see things that they do not wish you to see. And I would make it very clear that I would go to South West Africa next week if the South African Government would like me to do that. That decision is theirs and not mine. What I saw in 1959 was humiliating to me as a human being and as a white person. I do not need to go into detail about it because I think, as Mr. Gross suggested, most of it is in the official policy of South Africa. It is there as the law. It is not something which you have to deduce. You do not have to go to South West Africa and inquire why it is that no whites are, in fact, able to view the African population as worth being treated as human beings. The white population will tell you that. They will boast to you about it. I have heard it from the Europeans, with honorable exceptions here and there, as I saw it among the Africans. You do not have to do anything more than to read the statutes to discover who can vote and what are the wages you can earn, and where you can live, and what you have to do to visit your mother if you're African and she lives

in another community. There is no mystery as to what goes on in South West Africa; the only mystery is how the South African Government has the gall to go on still pretending that what is fact on their own statute books is not a fact. I want to add something else. When someone says, as My Hynning did, that I misstate when I say they are there by aggression, Mr. Gross, I think, explained perfectly clearly what the facts are. Let me reduce it to one very simple statement. South Africa is there for some reason. I would like to know what the reason is. If they are there because of the Mandate, they they cannot be there any more because the Mandate has lapsed. That is the simple fact about the Mandate. Why are they there after the Mandate lapsed? If they are there because the United Nations inherited the Mandate and decided they should stay there, then why did they stay there when the United Nations which inherited the Mandate said they should not stay there? If they are there, not because the United Nations inherited the Mandate but because it did not inherit the Mandate, then what on earth gives them the right to be there except the right of conquest? And they recognize that, because they testified to that fact. I have the documents here. Anyone who wants to read them can find the South African Ambassador to the United Nations referring to the fact that they are there by right of conquest. It ill behooves an American to be more royalist than the king and more South African than the South African Government. You do not deal a client justice when you deny that they are there for the reason that they insist that they are there. They do not say they are there because they have every right to be there under United Nations sanctions or under the Mandate. They say they are there by right of conquest; honor to those who in one situation finally admit the truth. It is the only place where they have admitted the truth. I think we should glorify that statement of truth, pay honor to it, rejoice in it. And I do so.

So far as the rest of the discussion is concerned, I would like to simply remind everybody of the simple fact that nobody ever replies to. South Africa is there; they are foreigners. Why are they there? What are they doing while they are there? Those are the central questions that we have to discuss, and all the technicalities about what is said and not said by the World Court on one occasion or another, as fascinating as they may be to lawyers, do not, in fact, get to the heart of the question involving us as human beings and as citizens of a very shriveled and bruised planet. How can you justify in the year 1971 a small number of whites anywhere in the world determining the destiny of a large number of non-whites anywhere in the world. What is the principle that makes that a possible way for this planet to govern itself? There is no such principle; and it is for that reason that it behooves everybody to understand that, even though we many not be able to end this horrible business tomorrow, we have every obligation to see to it that we do nothing either to condone it or extend it or make it easy or profitable for white people to behave that way. They are a disgrace to white people, not because all white people condone it but because it is a small group of white people behav-

ing in a way which is attributed, therefore, as long as we condone it, to all white people. And I hope there is still a place in this world where white people and black people and brown people can work together against oppression whether it is by white people or black people or brown people and whether it is of white people or black people or brown people. If there is one place where on a racial basis oppression continues without modification, without improvement, without even an intention to modify, it is in South West Africa, where the tragedy is that not only is this racial oppression continuing but it is done in the place on the earth where by conscience it should least be tolerated, namely, the place which is supposed to be the sacred trust of the whole human race.

The CHAIRMAN thanked Mr. Lowenstein and then asked for comments and questions from the floor addressed to members of the Panel.

Mr. FRANCESC VENDRELL, from the United Nations, speaking in his personal capacity, took issue with Mr. Eksteen's comment that the Africans in South West Africa were better off than those of the rest of the continent by noting that the average income in the African reserves in South Africa is \$30.00 per annum, one of the lowest in all Africa, and that Africans in South West Africa were in fact considerably poorer than in South Africa. He also pointed out that the idea behind the concession of the Mandate for South West Africa in 1920 was essentially a disguised union of that territory to South Africa; for this reason the Mandate, unlike all other African mandates, was classified as a C Mandate, giving South Africa far more rights over South West Africa than those enjoyed by other Mandatory Powers in their African mandates. It was thus not possible for the West and particularly for the countries signatories of the Treaty of Versailles to escape a moral responsibility for the fate of South West Africa. Economic sanctions limited to South West Africa were not enough unless extended to the whole of South Africa. Alternatively, in spite of its inherent difficulties, the possibility of a United Nations military force to oust South Africa from Namibia should be carefully examined.

Dr. ECON SCHWELB questioned Mr. Hynning as to the legal basis for South Africa's presence in South West Africa on April 29, 1971. He analogized the positions of the League of Nations and South Africa, respectively, to the owner of a car who lends it to another and dies before the car is returned. The borrower then declares himself to be the new owner, but maintains that he will drive the car with all respect to the rules of the road. Is there any legal system in the world which would recognize the borrower's title to the car in these circumstances? South Africa has violated the Mandate by its failure to report, to transmit petitions, and by the policy of "separate development" which it has been applying in the Territory. Thus, Professor SCHWELB queried, does not the principle apply that, when one party violates its obligations in a bilateral relationship, the other party has the right to terminate that relationship?

Mr. CLIFFORD J. HYNNING. I am not certain if I remember all these questions now, I will do my best. The first question is the *legal basis of South Africa's being in South West Africa*. In my opinion, the legal

basis for South Africa being in South West Africa was clearly stated in the 1950 Advisory Opinion: that South Africa is there by virtue of the League Covenant setting up the Mandate Agreement and that this obligation, these rights, cannot be altered except with the joint consent of South Africa and the League. Now the League has disappeared. What happens then? There is a dispute here on the historical record as to whether or not the 1950 Advisory Opinion correctly concluded that the United Nations had succeeded the League, where there was nothing in the U.N. Charter, or nothing in the 1945 and 1946 proceedings, which supports that. Where does that leave us at the present time? It seems to me that South Africa does depend on the Mandate for its position in South West Africa. But this is a mutual position; it cannot be unilaterally altered, unless the doctrine of termination of a treaty for a material breach comes into being. Here there are two problems: First is the failure to file the reports in the form contemplated for many years—is that a material breach or not? My own view is the filing of reports may not be a material breach. The filing of reports of petitioners—I would be much happier if South Africa had done that, but I do not think those are material breaches. Even if they were, it does not lie within the power legally of one party to the treaty to make that a binding determination. That determination must be made by some impartial agency in a manner that will be respected. I would say that South Africa is still in there by virtue of the Mandate Agreement and that the law of the case for the present proceedings is still to be found in the 1950 Advisory Opinion. That is also the law with respect to trusteeship under the U.N. Charter. The trusteeships cannot be terminated unilaterally without the consent of the trustee authority. Of course, in the case of the United States and its Pacific Trust Territories, this is explicitly provided in the Trusteeship Agreement, which says that this agreement cannot be changed or abrogated except with the consent of the United States.

I have a little difficulty understanding your automobile situation; that, after all, is a moving object and we are talking here about a territory.

Mr. Gross then noted that the key question is of the legality of the termination of the Mandate by the General Assembly. The Mandate itself provides that it cannot be *modified* without the consent of both parties. The World Court has held that submission to the supervisory jurisdiction of the United Nations is "the essence of the mandate," and, therefore, South Africa's failure in this area is a material breach. The policy of *apartheid* also breaches the Mandate, as the United Nations has repeatedly ruled by overwhelming votes. Lastly, South Africa itself has frequently disavowed the Mandate, which is a cause for considering a contract terminated.

Professor JOHN F. MURPHY agreed that the policy of *apartheid* must be condemned, but he questioned why Mr. Gross rejected the idea of a plebiscite in South West Africa. Did not Mr. Gross believe, Mr. MURPHY asked, that if there were a fairly held plebiscite, the people of South West Africa would surely opt for independence or temporary trusteeship as opposed to incorporation into or administration by South Africa? He further asked whether a threat to the peace calling for sanctions under Chapter 7 of



the Charter was not present if, as Mr. Lowenstein maintained, South Africa is an aggressor in South West Africa?

Mr. GROSS agreed that the idea of a plebiscite was appealing but commented that the United Nations has assumed direct responsibility for the administration of the territory and has been barred from the territory by the threat of force. The South African Government has never put to the United Nations the proposition of a supervised plebiscite. As the U. S. Legal Adviser has said, the South African Government should address itself to the United Nations as supervisory authority, rather than to the International Court of Justice, if South Africa is serious about its proposal for a plebiscite. By not doing so, South Africa is attempting to pose itself before world opinion as a competitor with the United Nations for the allegiance of the inhabitants of the territory, although the United Nations is obliged to further the interests of the inhabitants and has the right and the duty to have access to the territory.

Mr. A. M. SUSMAN asked Mr. Gross and Mr. Lowenstein what should be done to remove South Africa from South West Africa. On the one hand, we are told that the use of force against South Africa would be impractical, either because adequate forces could not be obtained or because great loss of life would result. On the other hand, the failure of the sanctions against Rhodesia illustrates the futility of that solution.

Mr. LOWENSTEIN replied that he did not intend to imply that the use of force in South West Africa is inappropriate. He suggested only that the use of force by the United States in South West Africa would be inappropriate, but could not comment on what the South West Africans themselves might do. The United States has an obligation to avoid all action which would condone, encourage, or result in profit from the situation. While any one action of the United States might not alone cause a change in the policy of South Africa, United States actions could encourage and spur on tendencies to change. As soon as South Africa indicated a willingness to change its policy, the United States should be prepared to negotiate and accommodate.

Mr. NEWTON-KING chastized the Panel for its failure to discuss the law and the current case before the World Court. He questioned the "law-consciousness" of those who were using the Court to resolve an essentially political issue, and asked Mr. Gross whether, if the World Court upholds South Africa's arguments that the purported termination of the Mandate by the General Assembly was not a legal termination, he would advise the Member States of the General Assembly who voted for termination to accept the Court's advisory opinion.

Mr. GROSS believed that if the Court made such a finding, without indicating by what right South Africa remained in the territory, the decision would have doubtful juridical validity. This would be the case, although an advisory opinion is entitled to the greatest weight in the international community. If the Court gave reasons for its opinion, then the international community should accept that opinion just as South Africa should have accepted the 1950, 1955, and 1956 opinions.

Mr. NEWTON-KING agreed that South Africa should have accepted these opinions, but remained bothered by the fact that indications are that the Court is being offered by the United Nations a carefully tailored opportunity to vindicate itself.

Mr. LOWENSTEIN noted that the Court brought a great deal of this on itself by consuming six years in what has to have been one of the most extraordinary series of decisions ever rendered by anybody anywhere on anything.

Mr. WILLEM J. LE ROUX of the South African Embassy questioned the figures given by Mr. Vendrell and also quoted from the 1966 I.C.J. Judgment to the effect that General Assembly resolutions can be of great persuasive force. He maintained that this does not make such resolutions binding at law.

Mr. EKSTEEN commented that discrepancies in wages between different population groups are not confined to South West Africa. He quoted from a statement by Congresswoman Patsy Mink, published in the *Washington Post* of April 26, 1970, regarding employees and salaries in the U. S. Trust Territory of Micronesia, where 407 Americans are employed, plus 500 Peace Corps Volunteers. The average annual salaries of Americans was shown to be \$10,000, while for the 4,578 Micronesian employees, the average annual salary was \$1,600.

Mr. HYNNING. I want to make clear that the answers I have given to Dean Schwelb were my own personal answers. The answers of the South African Government that were given in the World Court at The Hague were different. That is occasionally the experience of attorneys acting as legal advisers or counsel to strong-minded clients that other statements are made. I did not mean to suggest in any way that the South African Government has changed its position from that stated at The Hague; it is not relying on the Mandate, it is relying on other reasons.

I would like to say something about economic sanctions that have been brought up. I would like to introduce a consideration which must be very real to any American, and I think to any Britisher. You have seen and witnessed the ineffectiveness of sanctions against Rhodesia. These are sanctions on a small scale. Please bear in mind that if you contemplate sanctions against the Republic of South Africa, that must necessarily mean interference with trade and investment patterns between South Africa and the United Kingdom. This interference can have only one immediate result—a sterling crisis of unimaginable proportions. If you have a sterling crisis in 1971 or 1972 or 1973, you cannot avoid a dollar crisis, with our balance of payments in the precarious position it is in.

Mr. Lowenstein referred with approval to Mr. Gross' written suggestion for using foreign exchange controls. Consider what this might do to the dollar. I think the decision here is not going to be on the basis of political considerations; it is going to be on the consideration of protecting the dollar in international exchange. Economic sanctions against the country which produces 74% of the gold of the free world, and gold is still important, and which has this significant rôle in sterling area trade—this is folly

indeed. Now the word "folly" is taken from the concluding paragraph of Dean Acheson's letter on "United States Involvement in South West Africa." \* I would like to read two or three sentences from Mr. Acheson. He wrote:

As you see, my objections to Government's present course settle down to three points. If the United States does intend eventually to try to coerce South Africa out of South West Africa, it is following a path to huge and gratuitous folly. If the United States has no such intention, it is helping make mischief of a most reprehensible sort both by deliberately encouraging other states to mistake our intentions and by making frivolous use of international institutions. In any event, the United States has put itself in a position where to justify its course it must employ legal arguments that are dubious in basis and dangerous in implication.

The CHAIRMAN announced that prior to adjourning the meeting he would give each member of the Panel an opportunity to express one final thought in respect to the problem under discussion.

Mr. GROSS. I think the quotation from Mr. Acheson's piece is perhaps better understood if one realizes that in the course of that discussion Mr. Acheson nowhere referred to any of the central legal, political, or moral issues which we have discussed this evening. There is no reference in the course of his discussion, of which the conclusions have been read by Mr. Hynning, to the duties of South Africa as a Mandatory; there is no single reference by Mr. Acheson to the racial policies pursued by South Africa in the Territory; there is no single reference to the failure of South Africa to report to the United Nations; and, in short, the discussion proceeds on a basis, which one regrets to see from a very distinguished lawyer, which omits any sound, careful, considered legal analysis.

With regard to Mr. Hynning's comment and the *in terrorem* argument concerning the catastrophic effects upon the British exchange position, one finds difficulty in assessing that sort of argument in the context of South Africa's international legal obligations and its failure, as Mandatory, to carry out an international trust. It is true that the dilemmas are great indeed, and the obstacles in the path of applying economic, political, social and moral pressures are large, but to speak in this context, in this forum, of the disastrous economic and financial effects of enforcing an international trust, is merely to point to a serious dilemma. My colleague and friend from the Johannesburg Bar will, I think, agree with me that the difficulty of enforcement of a trust is not a valid argument to make when one is analyzing legal, political and moral issues of this magnitude.

Mr. LOWENSTEIN. I think, as the British member of the World Court remarked, that if South Africa is correct in assuming or asserting that she has no obligations under the Mandate because the Mandate has lapsed, then her right to be in South West Africa lapsed with the Mandate. If she was correct in that position, then we proceed to the problem of what you do about what her defiance of the lapsing of the Mandate

\* Washington Post, January 2, 1971, editorial page.

has done to world order, to law as a instrument for peace. That is the question that becomes the legal question, it seems to me, on which we have to focus. It is the danger of discussing this in a sort of antiseptic way, as if there are not hundreds of millions of people in the world who feel identified with the kind of oppression, which for some reason always seems to escape legal condemnation simply in the minds of so many people because the people oppressed are black; and I think we must not allow that kind of antiseptic detachment to creep in if, in fact, the Court continues to emasculate itself in this situation. My last comment would be to offer a deal to my friend from the South African Embassy. If he will join in denouncing the discrepancy in living standards between Africans and Europeans in South West Africa, I will join in denouncing the discrepancy in living standards between Europeans and Micronesians in Micronesia. And, together, if we will join in this fashion we will forge a vast new coalition to end racial injustice all over the world and the whole program will have achieved an enormous beginning toward doing something good.

Mr. EKSTEEN. I think that we can always discuss that and we can always come to a reasonable conclusion on what is going on in South West Africa and what is going on in Micronesia. I can only conclude that we have nothing to hide in South West Africa. The South African Government is willing to co-operate with anyone who wants to go and visit and see for himself what is going on in South West Africa. We extended an invitation to the World Court to go and see what is going on in South West Africa. They declined to do that. We extended an invitation to all the ambassadors accredited to Pretoria to visit South West Africa any time from May, 1967, when the invitation was extended, up to this time. Only a few ambassadors took the trouble to go to South West Africa. If Mr. Lowenstein wants to do me a favor, or would like to do the United States Government a favor, he can put some pressure on the State Department or the United States Ambassador to accept the invitation and to see for themselves what the actual position in South West Africa is and what is going on in South West Africa.

Mr. HYNNING. This evening was supposed to deal with the "Future of South West Africa." Much of the time has been spent on denouncing South Africa and seeking means of compelling her to get out of South West Africa. Little has been said about the plebiscite proposal or ways of *inducing*, not compelling change in southern Africa. I think if you talk too much about compulsion, changes are not going to occur. I think changes are happening in South West Africa; they are happening in the Republic of South Africa. The question is how do these changes occur. I think many of the remarks and the tenor of remarks here are not calculated to achieve changes, just the reverse. That I regret.

The CHAIRMAN thanked the members of the Panel and the reporter, as well as the other participants in the session, and declared the meeting adjourned at 10:45 o'clock p. m.

### ROUND TABLE: The Rôle of Congress in the Making of Foreign Policy

The session convened at 8:30 o'clock p.m. in the Presidential Ballroom of the Statler-Hilton Hotel. Mr. William D. Rogers, of the District of Columbia Bar, and a Vice President of the Society, presided.

Chairman ROGERS. This is a Round Table on the rôle of Congress in the making of foreign policy. A round table is different from a panel in that in a round table the participants are those who are too busy to prepare. They will address you for about ten minutes in a semi-prepared fashion and then we will go on to an open discussion.

### REMARKS OF SENATOR JACOB JAVITS \*

The plain fact is that we have gotten into the quagmire of an impossible war and have deeply divided an extremely unhappy country, with repercussions almost beyond our worst imaginings, short of a real debacle of our society, with a major impact upon the motivation of American workers, upon the motivation of American youth, upon the traditional optimism with which our people face their own future, and upon the regard in which we are held abroad. This is not image-building—this goes into hard currency, like the willingness of central banks and others to hold large amounts of dollars, which result from imbalances in our international balance of payments (attributable only to the fact that we have had to take a leadership position in the security of the world ever since World War II) and grave worries as to whether they want to hold those dollars, a deep concern by much of the business community as to whether we can effectively meet foreign competition even at home, because of this question of motivation and many other causes. In this quagmire—and we will undoubtedly get into the Viet-Nam war, although it is not absolutely essential to this particular subject—considering the situation in which we are engaged, naturally there has been a deep questioning as to the American Constitutional process and how it works. It is fixed pretty much upon the question of whether or not a joining by the Congress and the President of their respective powers in the making of foreign policy would get better results, more prudent results, and wiser policy than we have seen in respect to this Viet-Nam war. I believe it would.

The bill which I have offered, and which now has some seven additional Senate sponsors (the so-called War Powers Bill), is designed to utilize the American Constitutional process for the purpose of establishing checks and balances in the field of foreign policy so as to enable us to make more prudent decisions than we apparently have been able to make with the gradual vesting in the President of the power to make undeclared war. This does not mean that the President has *usurped* this power.

\* Senator from New York.

Rather, the Congress has *given* an open field to him, because the Congress has been unwilling or unable to insist on its own rôle in very critical decisions, such as those which led to the Viet-Nam war.

It will be said at once that the Congress has passed resolutions, and indeed it has, on almost every one of the critical foreign policy issues, including the Viet-Nam war (the famous Gulf of Tonkin Resolution, now terminated). However, a law on the books setting a Constitutional procedure requiring an exercise of responsibility by the Congress in the making of a decision with respect to the kind of a war we have in Viet-Nam is to my mind as different as day and night from a resolution which the Congress is asked to pass to show unity in the country and support of an awful decision—I don't say that invidiously, but only because of its consequences—taken by the President of the United States. I think the Gulf of Tonkin Resolution was just that kind of a resolution. It was rushed through the Senate because of the issue of solidarity and of backing the President rather than because Congress knew that it had half the responsibility and was assuming it in a deliberate and considered way. I do not guarantee that, if my War Powers Bill passes, there will never be another Gulf of Tonkin or another Viet-Nam. However, we will be taking all the precautions we can take, over, above, and beyond the will of one man, to wit, the President of the United States, in joining in that deliberative process and in carrying that responsibility as elected representatives who have to return to the people—in the case of the House of Representatives, every two years—in order to have their mandate renewed, with all of the individual, sectional, and personal block influences which that implies. I reject the proposition that the President is the wisest man on earth, or even that he has all the sources of information there are to be had. Today we all have pretty much the same sources, although we come to quite different conclusions because of our training, our background, our principles, and our vision of what the future should hold for our country and the world.

In essence, the War Powers Bill would act so that if hostilities involving U.S. armed forces continue for more than thirty days, the President loses all authority to continue such hostilities unless the Congress concurs. In the bill we enumerate four sets of circumstances under which he can initiate hostilities without *prior* authorization on the part of the Congress if indeed essential to the nation's security. However, his authority terminates within thirty days, or sooner if the Congress passes a resolution saying that it shall be less than thirty days. Those four cases are: to repel a sudden attack against the United States, its territories and possessions; to repel an attack against the armed forces of the United States on the high seas or lawfully stationed on foreign territory; to protect the lives, as may be required, of United States nationals abroad; and to comply with a national commitment—defining a national commitment as the Senate has defined it in its National Commitments Resolution (a measure which has the concurrence of the Senate and the President)—by using the forces or resources of the

United States in order to implement such a commitment. In all other cases, the President will have no authority to utilize the armed forces in hostilities without the concurrent authority of the Congress, because those of us who offered the resolution believe there is enough deliberative time in which to do that.

So much for the War Powers Bill, which to me is the central theme, because it is the ultimate sanction of a sharing of responsibility between the President and the Congress with respect to this, what I call, *awful* power to declare war or to wage war or to make war, even though undeclared. It is not popular to declare war now, because it springs into action many international commitments which lean one upon the other and make it unwise to take so massive a decision with respect to a regional situation.

Let me make just two further observations on Congressional authority in the making of foreign policy. First, there is the advise and consent function of the Senate, which is the responsibility imposed upon the President to consult with us. As the prelude to a treaty and when a treaty is in sight, such as, for example, a SALT agreement on disarmament, or a nuclear test ban treaty, of course the Executive is going to come to us and confer with us very closely. There are tricky situations, however, when we station forces on foreign soil, as a result of the so-called Spanish Bases Agreement, for instance when the Executive does not consult the Senate. There is much left to be desired in this advise and consent relationship.

There are sharp complaints in the Foreign Relations Committee, of which I am a member, that we do not get information, we do not get it in time, and what we get is pretty elementary. What you can read in the morning papers is then told to us as a secret, so we are doubly inhibited. What we know is no more than what the *New York Times* or the *Washington Post* knows but we are under a pledge of secrecy not to disclose it, a pretty anomalous situation. That is one great irritant which we have not yet adequately rationalized out with the Executive.

Another great irritant which is rather traditional, but is worse now because of the anomalous position of the National Security Council and those who operate it in the White House, is the inability of the Congress to get at whom they consider to be the real makers of policy (they are generally dubbed "presidential assistants") and the impossibility under our system of having access to their rationale and the reasons why they act as they do. I understand perfectly the need and the right of the President to have people who advise him, but it is a fact that if policy decisions are more concentrated in the White House, and perhaps less and less, aside from the mechanics, worked out in the State Department, this presents a great problem to the ability of the Congress to advise and consent or to proceed with intelligence in the foreign policy field.

Finally, there is the deeply vexing question as to whether to use, and whether it is practical to use, whether you *can* use the only ultimate power which the Congress now has undisputably: the power to deny money in

order to compel a foreign policy decision. This was the issue in McGovern-Hatfield, which proposed to deny money for the use of troops in Viet-Nam beyond December 31, 1971. I am a co-sponsor of the McGovern-Hatfield Resolution but I do not generally favor that route. However, I believe there comes a point at which, if there is no other remedy, and you feel deeply convinced that something is not done which must be done, then you even must resort to that measure.

## REMARKS OF REPRESENTATIVE PAUL FINDLEY \*

We all owe Senator Javits a great deal of gratitude for his part in bringing about what I hope will become a great debate in the Congress on war powers. The House made a start last year, reporting out a bill imposing on the President the duty to make certain reports whenever he sends military forces to foreign territory. This came late in the session and the Congress adjourned before the Senate took it up. The House Foreign Affairs Committee is in a very few days renewing its inquiry into this subject. One of the topics it will consider is the bill described to you by Senator Javits, and I am confident that the House again this year, as it did last year, will report out a bill dealing with this field, and, with Senator Javits' enthusiasm in the Senate, I am sure the same will occur on that side, and perhaps the issue can be joined in a conference committee and something actually presented to the President for consideration before the 92nd Congress is adjourned.

Although I feel that the Congress does have pre-eminent authority and responsibility in the war-making field, very clearly the Constitution confers many responsibilities in this area on the President, certain others on the Congress as a whole, and still others on the Senate. The language of the Constitution invites struggle among these institutions as to which will have the decisive voice in determining the course of the American nation. Quite clearly in this struggle the Supreme Court is almost no help at all. The final arbiter becomes the American electorate, with the Court, almost without exception, choosing to consider conflicts between the Congress and the President over war powers as extrajudicial. In considering this subject Congress has to recognize its own limitations; it cannot by statute reduce what a President perceives to be his Constitutional duties as Commander-in-Chief.

The President, if he sees fit to do so, may thwart a 30-day statutory limitation on his authority to continue hostilities: he might apply a very narrow definition to the term "military hostilities" as set forth in the statute; he might ignore legislatively imposed reporting requirements, like those spelled out in the House bill, or he might respond to them incompletely or too late; he can use the vast resources of his office to influence the happening of events; and he can marshal public opinion, so

\* Congressman from Illinois.



that, regardless of what the Congress might wish to do, it will have great difficulty in having any meaningful rôle in the determination of war policy. Certainly to the extent that events rather than legal interpretations tend to settle struggles over war powers, the President can be expected to have the upper hand over the Congress.

Last year, as I said, the House did pass a bill, a joint resolution which would require the President to report promptly to the Congress in writing any time he commits U.S. troops or military forces equipped for combat to foreign territory for almost any reason. (There are certain very minor exceptions.) The decision to place U.S. combat forces in foreign areas where hostilities may later develop could well have greater and graver repercussions than a subsequent decision authorizing such forces to continue or discontinue their engagement in hostilities. Certainly the psychological climate would be more conducive to a thoughtful, objective deliberation on the question of policy before the guns start blazing, that is, before the hostilities are joined. Under the House proposal, the President must give attention to a detailed report to the Congress at the very time that he ponders whether to commit military forces to foreign territory or to substantially enlarge forces already there, and at the very least, this would remind the President, and his advisers, forcibly and before the commitment occurs, of Congressional responsibility and authority in this area.

Had H.J.Res.1, as introduced in this Congress, been law, it would have required a prompt, written, detailed report on: the deployment of our troops to Thailand in 1961; the various troop build-up stages in Viet-Nam through August of 1964, when we passed the Gulf of Tonkin Resolution; the sending of Marines to the Dominican Republic in 1965; and recent military actions over Laos. I cite the latter because, when these operations over Laos were undertaken, the Tonkin Resolution had been repealed by the Congress. Each of these force movements that I have enumerated were undertaken without specific prior authorization of the Congress. Each either involved direct conflict or the definite risk of direct conflict. Most importantly, several of these instances might not have invoked the provisions of the very excellent proposal that Senator Javits is advancing in the Senate, while each of them would have required a report under the House proposal. Had this reporting requirement been in effect in 1962, when the number of U.S. military advisers in Viet-Nam was raised from 700 without combat gear to 16,000 equipped for combat, President Kennedy would have been required to explain promptly and in writing to the Congress several things as spelled out in the bill: first of all, the circumstances necessitating his decision; secondly, the Constitutional, legislative, and treaty provisions under which he took such action; and finally, his reasons for not seeking specific prior authorization from the Congress. In my judgment he would have been hard put to find any provision of treaty, of statute, or of the Constitution to authorize this placement of so many personnel equipped for combat on foreign

territory, and the reporting requirement of itself might have caused some sober second thoughts by the President. It might have caused him to reconsider, but if he went ahead, the report on the action would have provided the Congress with a formal document upon which to hold hearings, and, if it deemed advisable, to pass judgment. Certainly the consideration of such a report in 1962 would have been in circumstances much more favorable to objectivity than those that prevailed when the Gulf of Tonkin Resolution was very swiftly passed by the Congress.

The House bill would have required the President, promptly after the commitment of our forces to Laos on February 7, to report in writing to the Congress the circumstances necessitating this action, the authority under which he took the action, and his reasons for not seeking specific prior Congressional approval. The expanded reporting requirement is hardly a cure-all; as I said at the outset, a determined President can ignore it, or only partially comply with it, or be so late in complying that it has no real effect; but it at least creates the possibility that the Congress and its potential influence would be placed much closer to the point of great decision. It would require the President and his advisers to give thorough consideration to the judgment or reaction of Congress, as well as to those relevant provisions of treaties, laws and the Constitution to which he must turn for authority. The consideration of the legal justification of the action taken by the President, as Commander-in-Chief, would then hopefully become a part of the decision-making process itself, and not just an exercise of small importance undertaken by some lawyers down in the State Department long after the military action has been decided upon and begun. The Congress, charged under the Constitution with the power to commit the nation to war, hopefully would then be better equipped to fulfill this responsibility.

### REMARKS OF GEORGE W. BALL \*

The only great qualification I bring tonight is one of innocence. I have never heard of either Senator Javits' bill or Congressman Findley's bill, so I can only discuss these things from the point of view of having a little background in foreign affairs and a certain objectivity.

The problem that is presented here is a very agonizing one; it is the problem of the relations between the Congress and the Executive on some of the most profound questions that affect America. This was not a problem on which the Founding Fathers were very helpful. The objective of the doctrine of the division of powers, as Mr. Justice Brandeis said in a very famous dissent in *Myers v. United States*, was not intended to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save our people from autocracy. Given this Constitutional concept it was inevita-

\* Of the New York Bar.

ble that effective distribution of powers would be subject to periodic tidal flows, with authority shifting from one branch to the other and then back again, reflecting changes in the objective situation faced by the nation, the differing personalities of the individuals from time to time dominating each branch, and fluctuations in the mood of the country.

Nowhere has this been more conspicuously the case than in our external relations, since the Constitution does not clearly delegate authority over foreign policy to either the President or to the Congress. All it does is to confer on the President certain powers by which he can affect our foreign relations, while assigning certain other powers to the Congress, and still others specifically to the Senate. The result has been to encourage a spirit of institutional free enterprise, with active competition between the two co-ordinate branches. Sometimes that competition has been restrained or at least cushioned by easy working relations between the President and leading personalities of the Legislative Branch, as for example in the halcyon days of the 80th Congress, when Senator Vandenberg ruled the Foreign Relations Committee, a period that newspaper columnists almost invariably evoke with considerable nostalgia whenever they contemplate the present era of bad relations. The existing mistrust and antagonism between the White House and the key enclaves on Capitol Hill, notably the Senate Foreign Relations Committee, are a complex phenomenon, a conflict of personalities or even of ideas. The central focus of disagreement is on the rôle of Congress both in starting wars and in stopping them.

Today there is a growing conviction in Congressional circles that we should be stopping the Indo-Chinese war faster than we are presently doing. Compounding the disenchantment is a resentment that Congress was never asked to declare that war and a strong feeling that the Congressional approval given by the Tonkin Gulf Resolution was extracted under the duress of circumstances not adequately disclosed to the Congress and at a time when United States involvement was so limited and so marginal in Viet-Nam as to give little indication of the escalation that was to follow. In view of the lamentable history of the past few years, these feelings of frustration and of unhappiness are quite understandable, but if one looks closely at what really happened, it is not as clear as one might think just *when* the President might have appropriately requested a declaration of war. It could scarcely have been at the time President Eisenhower sent his original offer of military aid to Diem, nor was it to be expected when President Kennedy, acting on certain recommendations of Maxwell Taylor and Walt Rostow in the fall of 1961, substantially increased the number of our advisers in South Viet-Nam, since the Vietnamese trouble at that time was still a fight against an indigenous Viet Cong, with only scanty proof of North Vietnamese involvement.

There is a much stronger case for contending that such action, a declaration of war, should have been taken in the early months of 1965 when two events occurred almost simultaneously. First, main force units of the North Vietnamese appeared in the South for the first time, and second, we began using our air force against targets in North Viet-Nam. As we

now sometimes forget, our first bombing missions were justified on the Mosaic principle of tit-for-tat, at the outset in response to a Viet Cong attack on the American barracks at Pleiku, which excited a considerable amount of public indignation in the United States. I think it is likely that if the President had decided to ask Congress for a declaration of war at that time, he could have gotten it with very little more difficulty than was encountered in obtaining the Tonkin Gulf Resolution six months earlier. In retrospect he might have been well advised to have taken that road, although I do not say this with deep conviction. However, for a number of reasons, he chose not to do so, and I think it is well to recall them. The war then was still regarded as a very small affair. We did not, as the President made clear at the time, wish to wage a war, and certainly there was no thought then or later of a land invasion of North Viet-Nam, which a declaration of war might be interpreted as signaling. Not only would such a declaration have startled the American people with visions of large-scale combat, but it would have seemed out of joint with the times, since declarations of war were regarded by the cognoscenti, the really informed, as out of style, a fashion note supported by the datum that no war had been formally declared anywhere in the world since the adoption of the United Nations Charter. In fact, beginning with the Korean War, which had been fought without a formal declaration, Presidents had generally assumed that they had the inherent power to wage war, though President Eisenhower was something less than crystal clear on the point. Finally, there was a feeling that the Tonkin Gulf Resolution had already provided the necessary Congressional approval, for, after all, wasn't reprisal bombing just about the type of action that the resolution contemplated?

If a declaration of war was not regarded as necessary or useful at the time we began the bombing, it is easy to see why one was not requested six months later when American forces were first committed to combat rôles, for by then the casualties had begun to mount and the war was turning quite sour. Today it is fashionable to bewail the existence of an undeclared war, yet it is not very clear to me whether a declaration of war at any point in time would have done more good than harm. To be sure, it would have forced the Congress into a position of greater responsibility and it would have alerted the home front, all of which might be counted on the positive side; but here was a serious danger—and I think we would be foolish to discount it even now—a danger which no one could assess then and no one can really assess at the present time: a declaration of war at that time might have compelled one or more of the great Communist Powers to react in a very direct way, since they could hardly have ignored such a fierce and solemn action by the stereotype of imperialism, the United States, against a small, poor member of the Communist club. All this seems to be rather academic, however, given the mood then prevailing in the White House, for a declaration of war was just not in the cards for practical reasons that related perhaps more to domestic than international politics.

Whatever judgment one makes as to the course we should have followed, I think some things have become quite clear. Our whole unhappy experience in our Indo-Chinese involvement would appear to place practical limits on what any President may do in the future. It is hazardous to predict the actions of future and unidentified Presidents in future and unidentified situations. It seems very unlikely that any Administration will in the years ahead, or in the foreseeable future, deploy American forces in combat rôles overseas without asking Congress for a declaration of the existence of a state of war; nor do I think that expressions of approval as badly stated as the Tonkin Gulf Resolution will be forthcoming in the foreseeable future, since so many members of Congress regard April 7, 1964, when the Tonkin Gulf Resolution was adopted, as the day they lost control of the war. Unhappily, lessons for the future are no great comfort to a Congress feeling frustrated by its inability to influence the termination of the existing hostilities, and the frustration is certainly endemic among the Congressional doves today, and I say that in no denigratory terms. To be sure, the Congress has repealed the Tonkin Gulf Resolution, but that, as we all know, was only atmospherics. It has imposed restraints on the President's ability to use American forces in Cambodia, but it did not act quickly enough to prevent the use of American air power in supporting the Vietnamese incursion into Laos. The doves' predicament does not derive from the fact that Congress lacks power, but from political inhibitions on using it effectively, for while, through its power over the purse, Congress could clearly stop the war tomorrow if it chose to do so, this could be accomplished only if it were prepared to accept the responsibility for the consequences, which it manifestly is not prepared to do; and that is really the heart of the problem.

It has been suggested tonight that there be some rather specific, carefully drawn, cautiously thought-out restrictions placed on the Executive power. From the point of view of one who has grown up in the common law tradition, I do not really like the idea of codification and I do not think it works very well. I must say, from having had experience in government over a good many years in different positions, that the kind of proposed restrictions which Senator Javits has discussed could, I think, be gotten around by any good lawyer. I cannot imagine that any President, who wanted to do something, could not do it within the framework of the restrictions which have been proposed tonight, though it might be a little more tortured and a little less fair to the American people.

For example, on the question of the protection of the lives of American nationals abroad: this was why we went into the Dominican Republic. What we did afterwards one can argue about for a long time, but I happen to have been a part of that decision, and it was made for only one reason, that there were some people in a parking lot next to a hotel who, as we were given the information, and we had no other sources available to us, were in very serious danger—and when you are in a position of responsibility, as Mr. Bundy and I were at the time, you react—so American forces were sent in to rescue these people. The whole Do-

minican Republic adventure can be argued in great detail, and no doubt will be, but this was an example of a reaction to protect the lives of United States nationals abroad. I can think of hardly anything that we have done that could not be justified under one of the standards that Senator Javits has suggested.

I have a considerable disinclination to favor any sort of rigid, codified Congressional restraints on Executive power. I do not think this is the way you do it. Once, when we tried to do it by the Neutrality Act, we got ourselves into an extremely difficult position which almost prevented us from acting effectively in the face of a greater European crisis, and I am very reluctant to see this again. What is really involved here is a kind of serious effort on the part of any Administration with any Congress to try to establish some lines of communication, and some serious effort on the part of any Congress to try to improve its position with the White House so that these things are really talked out. I do not think, however, that this is done by the kind of rigid standards that are being proposed in the legislation which is now being discussed.

### REMARKS OF McGEORGE BUNDY \*

I am in favor, so far as I yet have a ripened judgment on the subject, of both Senator Javits' bill and Congressman Findley's bill. I do not regard them as having the rigidities that bother my old friend and colleague, George Ball, because what it seems to me that Congressman Findley is saying is that a formal reporting requirement cannot hurt and may help, with which I agree; and what Senator Javits is saying is that, whatever may be the rights and wrongs of claims the President might make under his four excepted powers in the first 30 days, it cannot do any great harm to have the matter brought to the Congress and fought through with a resolution that does or does not authorize continuation of the activity in some form and under some conditions. I agree with that. I not only think it cannot do harm, I think it could only do good.

I agree with George Ball that the problem about the way we got into Viet-Nam is not that this was not what the country wanted, nor that it was done by deceit, but rather that the problem of consultation and discussion and of continuous review—and now I am going beyond what he said and saying what I think—was not adequately sustained by the President and the Congress and that neither one is uniquely responsible for that. Congress had its own good reasons, in 1965 and after, for not engaging in a process of shared consultation.

What I like, in particular, about Senator Javits' bill is that it does not require that the authorization from the Congress should be limited to the process of a declaration of war. I think that one of the reasons that we have not had declarations of war in the last 25 years is that, by all our history and tradition, the declaration of war is an uncommonly liberating

\* President, The Ford Foundation.

force, in terms of the powers of the Executive Branch itself and in terms of what it may set loose in other countries. I do not know how far this may be certified international law, and I do not know what the tradition is, but it seems to me, reading the Constitution, that the power to declare war includes the power to authorize hostilities under conditions and limits, and that these conditions and limits are what our experience in the last seven years suggest to us should be an important topic of explicit consideration by both the Executive and the Legislative Branch when one faces the kind of very hard choice which I believe was faced in 1965 and about which I am not as categorical as I fear a majority opinion is, looking back.

The other side of the problem is that it seems equally important to engage the Congress, and to engage it actively, in the process of extrication, and we have that question before us right now. Whether you are a lawyer or not, it is very hard to reach the conclusion that the current relationship between the Executive and the Legislative Branches is very satisfactory, either legally or politically, as we consider the question of next steps in Southeast Asia. The Tonkin Gulf Resolution, whatever it may have been worth, is gone. Its coming-and-going puts in very grave question the applicability of the Southeast Asia Treaty to the powers of the United States Government in Southeast Asia because, if a stronger bill has come and gone, what is the meaning of a treaty in the current situation? The President, as I understand the current position of the Administration, rests his powers entirely upon the authority of the Commander-in-Chief to protect particular troops in a particular situation and, under that authority, a variety of things with a near or a distant relationship to that objective have been authorized unilaterally without, as far as I can tell, serious consultation and certainly without agreement from the Congress, in countries well beyond the boundaries in which Mr. Nixon found the war when he became President.

One can have a good deal of sympathy with the President in this situation. It is not altogether clear how he would go about re-establishing a process of co-operative and shared responsibility, and yet it does seem that that is what is going to have to happen. It is clear that there is a growing pressure deriving not only from the sentiments of members of the Congress themselves but from the sentiment of the country, that we do need to end this thing. The process of ending it is a very difficult matter and I think no one is prepared to say, certainly I am not, that we have any reason to believe that the affirmative diplomatic powers of the Congress, either by a crude use of the power of the purse or by legislative deadlines, or both, are likely to be the best way of managing what at best will be a very difficult business. The current test for both the Executive Branch and the Legislative Branch, but in the first instance for the Executive Branch, is to examine the ways and means of re-establishing a co-operative relationship and a shared responsibility between the Executive Branch and the Congress in the process of extrication from Southeast Asia.

Senator JAVRS. Mr. Ball, in his comments on the rôle of the Congress in warmaking policy, erected as a standard that we would have to ask for a declaration of war, and he said that the President might appropriately have asked for a declaration of war at a number of given times with respect to Viet-Nam. It is precisely because I do not want the President to have to ask for a declaration of war that I proposed my resolution. I derive the necessary authority in the Congress to join with the President in an action involving hostilities, which is less than a declaration of war, from the power of the Congress to raise and maintain armed forces, to make rules for the government and regulation of the armed forces, and from its so-called general authority to make laws necessary and proper for carrying into execution its powers.

Mr. Bundy emphasized exactly the right point for my bill, in stating that an abrogation of a declaration of war requires a treaty of peace, whereas a resolution can be operative according to its terms and provides for the Congress to join in extricating us, as well as in getting us in. However, the main thing that I wish to emphasize is this: Certainly the Congress may not choose to exercise the responsibility of joining with the President in the making of undeclared war. I doubt that any President would like to have the responsibility of making undeclared war. but we, as the people, must *require* the Congress, in the interests of the best and most prudent decision, to take that responsibility. Once they take it by law, they are charged with it, and are accountable to the people. You will not have this off-the-top-of-your-head, one-day debate, rally-round-the-flag, and rally-round-the-President kind of decision which has been characteristic of the Gulf of Tonkin Resolution and a number of others that were passed. It is precisely for that reason that a law is needed. The President can ignore it, but he too has to be responsible to the people, and I doubt that any President is going to want to violate a law of the United States, get us into war after he has violated it, and face that issue with the electorate. We want to slow up the whole process of getting us into war. Instead of in-cabinet decisions, let us bring the issues out on the floor of the House and Senate.

Congressman FINDLEY. George Ball mentioned the tidal flow of war-making authority first to the Executive and then to the Congress. I cannot recall even reading about any tidal flow of authority to the Congress in this field; it has all been in one direction over the course of history. Indeed, the American Presidency, as far as I can recall, has gained in authority in most respects at the expense of Congress steadily through history with one exception, and that was the adoption of the two-term limitation on the President. Otherwise, the institution itself has grown steadily more powerful through the years.

I would like to mention, too, that the Congress is a rather reluctant dragon, and as evidence of this I think I can say without qualification that the Congress has not spoken officially to any question of fundamental policy in Viet-Nam since the Tonkin Resolution. On several occasions



I tried to get amendments and resolutions through the House, which would at least express Congressional approval of troop withdrawals already effected and support for the President's announced determination to withdraw the remaining forces at the earliest practicable date. Yet, on every occasion—and some of them came to a vote on the House floor, albeit non-record votes—any language of this sort was rejected.

Another item I would like to mention is that the language in the House bill I think might please Mr. Ball on several points. It does not impose a rigid formula; it does not require that the Congress make a decision, so, to this extent, it would enable the relationship between the Congress and the Presidency to develop the sort of common law experience that Mr. Ball finds so attractive.

Mr. BALL. If I were pressed to make a choice between Mr. Findley's bill and Mr. Javits', I would opt for Mr. Findley's bill, because I think the idea of reporting is totally unexceptional, and I would be all for it because I think the more reporting by the Executive Branch to the Congress the better, and if the Congress wants to put any kind of legislative mandate on the Executive Branch to report, it has my three cheers.

I am rather better informed than I was earlier, because I have had an opportunity now to see Senator Javits' bill. I can only tell you this, that if you take the first provision (which permits the President to act by committing the armed forces of the United States to repel a sudden attack against the United States) obviously there is nothing anybody can argue about with this; as a matter of fact, this was the reason, according to Mr. Madison's notes, why the Constitution was changed from the question of "making war" to "declaring war" in order to give the President the opportunity to act under these circumstances.

As far as "repelling an attack against the armed forces of the United States on the high seas or lawfully stationed on foreign territory": this is exactly what Mr. Nixon has been using as a justification for doing all kinds of strange things, some of which I find rather objectionable. I think that this enlargement of the area of combat by the tactical seductions of an incursion into Cambodia in the first instance, and then into Laos, has been justified exactly on this basis.

On the question of "complying with the national commitment," here again the biggest argument I always heard in favor of Viet-Nam was that we are complying with various national commitments. It really was not until the beginning of 1965, when main force units of the North Vietnamese began appearing in the South, that we ever talked seriously about the SEATO Treaty, because, by and large, up until that point there had been a good deal of reticence on that question.

We come to the final point, the question of "stopping hostilities after 30 days in the absence of a declaration of war": I just cannot imagine the Congress ever doing it. The Congress *now* has the chance to stop the war in Viet-Nam if it wants to, and it is not going to take this responsibility. In the kind of exciting circumstance where forces are committed in combat

rôles overseas, and the concomitant excitement which is inevitable in such situations, and a very heightened level of engagement of American opinion that results from that, I cannot believe that Congress is ever going to take this responsibility, any more than it is prepared to take the responsibility right now of getting the forces out of Viet-Nam.

I do not say these things critically, and I certainly do not say them in any mood of disparaging this effort. I think it is a very good effort, but I do not really believe it is going to work, and I do not really believe it is terribly well advised. I think that McGeorge Bundy began to get sensible in the latter part of his remarks, when he talked about creating a spirit between the Executive Branch and the Legislative Branch where they really could commune together and could make some common decisions. I do not think this is done by gimmicks, and I do not think it is done by legislation.

Mr. Findley has said that there has been a constant progression, a constant movement of power from the Legislative Branch to the Executive Branch. I do not think this is true. I remember very well the two or three weak Presidents, beginning with Mr. Harding and Mr. Coolidge, who quite frankly were the prisoners of the Congress, and nothing was more apparent as indicating the ascendancy of Congressional power than two things that occurred: one, when Wilson was still alive, the Congressional action, or the Senatorial action, in rejecting the League of Nations; secondly, the mood of isolationism which prevailed during that time, culminating in the Neutrality Act, which was a very mischievous piece of legislation and which almost prevented us from acting from a point of self-preservation to stop some terrible forces which were building up in Europe. I do not believe at all that this thing has been a one-way development. I think it has been a fluctuating thing and I think it is likely to be again, and I do not want to see it go back too far the other way. I do subscribe to the idea that there ought to be limitations imposed on the Presidency, but they ought to be limitations of personality and force and understanding and arrangement, where the two co-equal branches of the government work together in a much more sensible way than they have up to this point.

Mr. BUNDY. I think it is important to remember that in 1964 and 1965 it would be a very queer misconstruction of events which would have made the Congress more thoughtful about the possible consequences of what we were getting into in Viet-Nam than George Ball was. The only other thing I would say about George is that about one more reading of these bills ought to bring him around. They are not even as bad as he still thinks they are, and the reason they are not is that what they do seem to do in their framework is precisely to require shared responsibility and not to require an abdication. I agree with George that Presidents and Administrations doing the things that the country wants done will find a way to do them in matters that engage the pride of the nation, and the Congress will generally be with the monarch. I do not think for a minute that it is necessarily wise to prevent that from happening in the sense that

in the end we are all stuck with the fact of what we as a country think at moments of stress, even if that may not be perfectly wise, as it was not in the 1930's, and may not have been all the way through the 1960's.

I think there really is a prospect of progress in the immediate future in this concept of a sharing of responsibility. I think George Ball is dead right: the Congress is as responsible as the President for this separation. The Congress has the power to assert itself; it hesitates about doing so. I would, too, if I were in the Congress, if I were a Representative or a Senator, suddenly to assert that by a particular date, now let us say only eight months away, we are going to have no troops in an area where we currently have 275,000 in engagements of various kinds to various governments; that would seem a hasty action. On the other hand, I would feel a pressure to find a policy that will produce this result, if not in that exact number of months, then in a finite period of time that I can report to myself and to my constituents.

The President has a problem. He wants—he says he wants—to end the war. He means by that, primarily, the American engagement in the war. He is not attempting to prejudge whether there can be an end of war, an end to all conflict, an end of all testing in an area so confounded by conflict over so long a time. I doubt he is saying that by any date certain or early the United States is going to take the position that it will never send another bag of rice, another packet of hospital equipment, or another piece of military equipment to any of the three governments in the three countries which are in that war; but any of those actions will engage the Congress.

Between the national desire to end the war and the national responsibility not to end it dishonorably there is ground for work together, and that work has to engage both the Executive and the Legislative Branches. What is really distressing about the current situation is that, for their separate reasons, well developed over a long period of years, the two branches seem to be insistent upon not communicating with each other.

At this point Chairman ROGERS opened the discussion to questions from the floor.

Mr. CONSTANTINE MELOS. Under what scheme of things do you envision the executive type agreement that has engaged U.S. energy and forces throughout the world and perhaps the curbing of the power or the expansion of it in the War Powers Act?

Senator JAVITS. In answer to this question about executive agreements, my thought was expressed in the so-called Commitments Resolution, a Senate resolution (the product of the work of Senator Fulbright and Senator John Sherman Cooper of Kentucky) which makes the decision hinge upon whether the commitment undertaken is to utilize either forces or resources of the United States. If forces or resources of the United States are to be utilized, then we consider it a commitment which should be made either by resolution or in some other Congressional action. There are two kinds of action which are possible. One is a treaty ratified by the Senate two-thirds;

the other is a concurrent resolution by House and Senate; either would satisfy the Commitments Resolution.

An executive agreement, on the other hand, according to our view of it, would be confined to relatively insubstantial and transient matters which do not for any profound purpose or time or in order of magnitude commit the use of United States forces or resources to implement that agreement. Two extremes would be the Test Ban Treaty, for which the Senate should share the responsibility, and some treaty on the utilization of grounds or areas contiguous to an Embassy or a similar problem related to the American presence in a given country, which could be handled by executive agreement.

The Symington Subcommittee, of which I am a member, is looking into the question of our commitments all over the world. One of the big problems which we find is that not just by executive agreement, but simply by the physical act of stationing a military assistance group or some other unit on foreign soil, we have established a trip-wire operation, in which the United States is, in effect, responsible for a commitment.

In all of these matters I do not disagree with our colleagues, who have the experience in the Executive Department, about the tremendous need for a closer relationship. I think the only thing we have some difference on, is what will produce that closer relationship. Must we just wish for a personality both in the Congress, like a Vandenberg, and in the Executive Department, like an Eisenhower, or can we have methodology, a bill or resolution, a law which will give us the framework in which to bring it about?

Professor JOHN NORTON MOORE. Senator Javits and Representative Findley deserve our thanks for initiating a very useful dialogue on how best to strengthen the rôle of Congress in the making of foreign policy. The widely shared dissatisfaction with the Indo-China war, however, ought not dictate the specifics of legislation setting a critical relation between Congress and the President with which we must live for the next decade or longer.

Ultimately, choice between the Findley and Javits approaches must be based on analysis of the specific costs and benefits of their bills. H.J. Res 1, embodying the Findley approach, would establish a requirement for Presidential reports to Congress roughly whenever the President sends United States military forces abroad. It seems to be a bill which would be quite helpful in increasing the information flow between Congress and the President at very little cost in Presidential flexibility. Perhaps also we should consider establishing a joint Congressional committee specifically for consultation with the President on war-peace issues.

The Javits bill, however, which would specifically delimit Presidential authority in advance, is troubling. Aside from the wisdom of attempting specific delimitation in advance, which seems to me extraordinarily difficult and prone to serious omission, it is urged as a benefit of the bill that it would provide a new route to Congressional authorization of hostilities

abroad. That is, it is urged that, as things stand now, all that is Constitutionally available is a declaration of war or nothing at all and thus the bill would make the situation more flexible. But this either-or analysis was rejected by the Senate Foreign Relations Committee in its National Commitments Hearings. Even without the Javits bill Congress may authorize the use of hostilities abroad by a wide range of techniques in addition to a formal declaration of war. On the cost side of the analysis, has the Foreign Relations Committee given any thought to the impact of legislation such as the Javits bill on United States participation in peacekeeping operations, and particularly, the interaction of the bill with the United Nations Participation Act? My own analysis is that, in the event we are able to conclude an Article 43 agreement, the Javits bill would somewhat undercut Presidential authority to participate in United Nations peacekeeping operations under the present Act, but I would be very interested in the intent of the Foreign Relations Committee on this point.

Mr. BUNDY. I accept Professor Moore's judgment, because he is a Constitutional lawyer and I am not, that the Congress already has the power to authorize hostilities by other means. That is clearly true, because if it does not have that power, it does not have the power to pass Senator Javits' bill, which I think it clearly does have the power to do. The advantage of the bill is that it sets up a procedure which operates: The President must promptly, if he wishes further authorization within thirty days, report what he is doing and suggest, since he will wish to keep the initiative (any President would), the kind of authorization he wants for the kind of problem he is confronted with. In my opinion that is a very healthy requirement upon the Administration.

If we look back to the year 1965, which George Ball has referred to, and you try to sort out the reasons why the President undertook the bombing of the North and the introduction of major combat units in the South in Viet-Nam, without asking the Congress for an authorization beyond the Tonkin Gulf Resolution, and if you ask the further question why the Congress raised no serious question about that procedure, I think you will find that there are all sorts of pressures both upon the Executive Branch and upon the Legislature for the avoidance of the kind of close engagement with what it is you are trying to do, what the difficulties may be, how far you mean to go, under what conditions you are going to proceed, and what assurances you have about further consultation. It is very important to remember that it is a myth to suppose that all this happened in secret; it happened on the front pages of the country, in every State in the country. It was not a deception of the Congress. It was a decision by the Congress not to get into the act, and a decision by an Administration heavily engaged in a major domestic program, always reluctant to face the hard work of going through all those committees and lots of other reasons, not to have that process. We all have paid for it; it would not happen under Senator Javits' bill. I would like to add, however, that other things would have happened. There would have been a war. How much war, how long a war, is another question. I

am sure that that was the sense of the country six years ago. That does not mean that it will solve our next set of problems completely, or that it will fit precisely the crises of the coming decade; it does set a procedure of consultation and a requirement of affirmative authorization which, on the historical record as a whole, makes reasonable sense for the next space of time. That is all I would claim for it. That is quite a lot.

Senator JAVITS. As to peacekeeping forces, certainly if my bill became a law, I would expect the President to ask the Congress' consent before he engaged to establish peacekeeping forces. I think that is the way in which our country has to go. I think, more and more, that the great commitments which lead to these dreadful situations have to be taken with more deliberation by all the people with a lot of public light on the issues. There are a lot of disadvantages, but, in my opinion, based on our experience, it is within this crucible that the best decisions can be arrived at.

Mr. GEORGE BALL. I am totally in sympathy with the objective that Senator Javits has in mind. I think that we ought to try to bring about a situation in which the Executive does consult the Congress in a much more straightforward way than has been the practice over quite a long period of time. I think we could have avoided a lot of troubles if this had happened. If I have doubts about it, they derive primarily from the fact that, as I suggested a while ago, I am a common law lawyer, and I am rather skeptical about codification.

If we put ourselves back into the mood of 1965 and if we look very specifically at this proposed legislation of Senator Javits, which has been very carefully drafted, let's see what it really says. It says that "armed forces cannot be used unless the initiation of military hostilities under circumstances described in paragraph A, in the absence of a declaration of war shall be reported promptly to the Congress by the President as Commander-in-Chief." I do not think that this would have created any inhibitions on anybody in 1965. I think that the President could have reported everything that he was doing to the Congress. I am sure that he thought he was doing it, together with a full account of the circumstances under which such military hostilities were initiated.

Let us look at this carefully, "such military hostilities, in the absence of a declaration of war, shall not be sustained beyond thirty days from the date of their initiation, except as provided in legislation enacted by the Congress to sustain such hostilities beyond thirty days." What was the legislation situation in 1965? First of all, we had the Tonkin Gulf Resolution of August, 1964. This was a very interesting piece of legislation; this was not a concurrent resolution; this was not simply a resolution which expressed the mood or the sense of the Congress; this was a joint resolution; it was signed by the President; it had the force and effect of law, and what it did in effect was to authorize the President to do any thing he pleased. That was a great mistake. It was very open-ended, but there was no doubt at all that it gave him the authority to conduct the kind of warfare that he did conduct and to commit American troops as he did commit them and to do it for a period beyond thirty

days. I have a feeling that if Mr. Bundy and I were back in 1965 looking at Mr. Javits' legislation, which would then have an honorary place in the Code law of the United States, we would probably have said, "Well, really, we already have this."

Mr. BUNDY. I quite agree, George, especially if you had been our lawyer, that we could have managed nearly anything in 1965, but of course it is true that Senator Javits' bill will have also behind it now the experience of history, and without Senator Javits' bill I would agree there will be care about the language of any future resolution remotely resembling the Southeast Asia or Tonkin Gulf Resolution. With Senator Javits' bill, a procedure will exist. I agree, you cannot at this range re-enact legislative process, and it is certainly true that the sweeping terms of the Tonkin Gulf Resolution could have been used as a reason not to act further in 1965.

Professor HANS LINDE. At the time of the Cuban missile crisis I believe there was some opinion in the Administration for an air strike. Would either of these resolutions have in any way involved Congressional participation in that decision?

Mr. BUNDY. I think the short answer to your question is, "No," because, as I understand the circumstances of the Cuban missile crisis, they would certainly have created a situation justifying Presidential action and *then* a report to the Congress. I think it is also true that an Administration could have decided under this resolution that it would prefer to report the circumstances and ask for Congressional action. In that particular case the Executive judgment went against an air strike and in favor of a quarantine, and I think wisely (and again, that result was due a great deal to George Ball).

The reason for acting under Presidential power and by informing the Congressional leadership, rather than consulting with and seeking the authorization of the Congress as a whole, was what was then perceived, I still think rightly, as the very high importance of reaching a decision and putting the train of events in action, without the extraordinary emotional impact of a debate and without the betrayal of the American diplomatic position and the loss of the diplomatic initiative to the Soviet Union. Both of those considerations seem to me to be right. Broadly speaking, the first reactions of most people to this problem were more violent or more terrified than the actual decision which the President took. I blame no one, having been through those same emotions myself, for hasty reactions in the particular case of the sudden information to the Congress on the very night, I guess, of the President's speech. I think it is clearly right on the upshot, that it was wise for the President to pre-empt the diplomatic position which put the burden of proof and the burden of guilt on the Soviet Union. I do not, therefore, think that this resolution would have done more than to require the President, if he had intended to sustain the quarantine for more than a period of thirty days, to seek authorization from the Congress, which in those circumstances I am quite confident would, in fact, have been forthcoming.

Chairman ROGERS. Have those on the Hill who have been proposing this new marriage, or at least love affair, between the Congress and the Executive on foreign policy considered the extent to which Congress is wholly equipped to carry out its side in this relationship?

Senator JAVITS. I favor imposing the responsibility on the Congress. However, I think that is the touchstone of what I have suggested and I think that is the touchstone of what has interested McGeorge Bundy and others. I think also the effect on the Congress is very important. Primarily, this matter would involve dealing with the Foreign Affairs Committee of the House and Foreign Relations Committee of the Senate.

The Congress may not act the way we would want it to, but this is the best body we have in terms of representing, as Mr. Ball said, that co-ordinate branch which also expresses the people's will, and the same might be said of the President. Mr. Ball spoke of two Presidents whom he felt could have been improved upon in the foreign policy field. The American people may feel extremely disgruntled with what a President is doing, and indeed one President very recently decided he saw so much disgruntlement that he chose not to run. However, I do not think that the imperfections of our institutions can be an argument against the utilization of those institutions for the purposes for which we have established them according to the Constitution.

Professor PAUL THARP. Assuming that communication does appear to be the heart of the problem here, and also assuming that communication should perhaps come before the crisis rather than after, which is about the only real fault I find with the Javits bill—it's still an after-the-fact proposition—I would like to know: Has any attention been given the idea of including on the National Security Council various leaders of the Congress, perhaps majority and minority leaders of both Houses, or their delegates, or the Chairmen of the four major foreign policy related committees, Armed Services and Foreign Affairs?

Chairman ROGERS. Would you include in that some of the recent suggestions that have been made for a tentative permanent floating joint committee of the Congress as the perpetual and continuing target for information and reporting from the Executive?

Professor THARP. No, I am thinking more in terms of the direct involvement of Congress in the most recent secret deliberations of the policy-making process, actually sitting around the table at the National Security Council.

Senator JAVITS. There is a proposal in the House of Representatives which is attached to my bill, introduced by Congressman Horton of New York, to establish a permanent committee of liaison between the Congress and the President respecting national security matters, given a structure and perhaps even given a staff. I would rather think there is a lot to that idea. I greatly appreciate hearing the views of our colleagues who have been in the Executive Department.

There is this one drawback: The euphemism, the "leadership in the Congress," does not necessarily mean that the majority and minority leaders



of each House, and two or three other party officials of each House, know something or that they are satisfactorily representative of the Congress. One of the powers of our Congress is that people are persuaded, people change their minds. The public attrition, our attrition upon each other, the attrition of the press, and the attrition of debates like this, have a great deal to do with the final decision, so that, though a liaison committee is desirable, I do not think that is really the answer. I am interested, I think it can be done and it would be useful.

I do not think the President would want to accept anybody *on* the National Security Council from the legislature, because his is an independent Executive Department. The standing committee idea is a very good one, but it does not fill the bill for the reasons which I have mentioned. It could be a settlement, it can be a help, but it does not resolve the question of foreign policy-making.

Mr. BUNDY. The person who makes decisions in the Executive Branch is the President of the United States. He does so with the advice of the people whose advice he seeks out. No statute can decide who those people are, or what that process is, and if you were to legislate additional members to the body you would ensure it's being relegated to an even lower level of usefulness than it may now have. So that is not the way to do this. Even now, although the *staff* is extremely important, I think it is a safe bet from a safe distance that the National Security Council is not where the serious decisions are made. Serious decisions are made by the President with the advice of the people whose advice he seeks, and you cannot legislate that. You certainly cannot, under a presidential government, require the President, under our Constitution, to include in those councils particular persons who have risen to particular posts in the Congress by seniority. It is very important to consult with them in ways and means that the President and the Secretaries will choose, and it is extremely important to develop processes of information and consultation wider and deeper and more continuous than those which would be triggered by a particular bill like the ones we are discussing this evening.

There is a terribly heavy responsibility that falls, and must fall here, on the Cabinet departments, because there really is a very good reason why those who work as staff assistants to the President should not be regularly available for formal hearings, either executive or open, on top of the Hill. That is not the kind of job which they can discharge and maintain their usefulness to the President, who has a right to the kind of personal staff assistants that anyone else in large-scale enterprise needs.

Mr. BALL. There is a kind of mythology which was implied in what Mr. Bundy said: that the National Security Council is roughly analogous to the Board of Directors of a major corporation. There is one very fundamental difference which I hope you will all bear in mind: the Board of Directors of a major corporation can fire its president, but the President cannot fire the National Security Council.

Professor EDWIN B. FIRMAGE. I have a question for Mr. Ball. I am disturbed by what seems to be a contradiction between his public record

and his comments here tonight. We are told by various memoirs and the news media that he was the Devil's Advocate in the White House during these Viet-Nam years; I assume that that rôle was performed on the basis of conscience and not by appointment. Yet he has opposed both the Javits bill and other similar measures, both in his editorials in *Newsweek* and here tonight. He seems to have taken this position of opposition on two bases that are mutually inconsistent. On the one hand Mr. Ball has asserted that the influence of the Javits bill would be so powerful that its result would be similar in effect to that of the Neutrality Act; on the other hand he asserts that the bill is so weak that it could not possibly avert another Viet-Nam. Finally, his own proposals for avoidance of a similar tragic mistake in foreign policy would seem to amount to a collection of vague adjectives without substance. I am wondering if there are no concrete lessons regarding the conduct of foreign policy, including, perhaps, suggested institutional reforms within the Legislative and Executive Branches and their interrelationship in this area of governmental policy formulation, that he would have carried away from those important years of government service and would be willing to share with us tonight.

Mr. BALL. I have lived long enough in the government to believe that there are very few institutional solutions to anything at all. I have a feeling that whenever we try to tinker with the machinery to evolve some new kind of requirement of one kind or another that it really does not get us very far. The problem that we face right now is the problem I suggested earlier: the Constitution is really pretty vague about who has the responsibility for foreign policy. When there is a strong assertive President, when there is an atmosphere of turbulence in the world, the President is selected to run with the ball. A President is well advised to bring the country with him, and if he does not, he gets into trouble, and we have seen an example of that. By bringing the country he also has to bring the Congress with him, and this is most important of all. I do not think this was done properly and we all feel a little sense of *mea culpa* about it; I do not try to absolve myself, I did have views on Viet-Nam, but at the same time I also have a sense of real responsibility for all the things that we did collectively during this period, and there is no point in trying to say one man had better views than another; this is what happened.

Let us look at it seriously. I frankly do not think there were any mechanical, institutional arrangements that would have made very much difference. We were ending a phase in American foreign policy where the momentum of doing a lot of things which had been very useful over a very long period of time carried us into an adventure which was not very useful because, while it had a surface resemblance to some things we had done before, it really was something rather different, and we got into trouble. I do not think that the fact that the President might have been compelled by one piece of legislation or another to talk to the Congress would have made very much difference. I think quite frankly that there was much more concealment; I do not say intentional concealment, but much more of a spirit of "let's do things without trying to explain too much to the public"

than there should have been. Again, I do not think this would have been altered by legislative arrangements. Machinery is something that, maybe because we are a rather mechanical nation, mechanically inclined, we tend to exalt too much. In government, I find, it does not make all that much difference.

We talked tonight about the National Security Council as though it were a rather mystical body that had powers of decision which it does not have at all. It is an instrument which the President can use or not use as he sees fit. By and large, in my experience, the decisions were made before the National Security Council ever was convened. It was convened in order to ratify what had already been decided and in order to give the word to certain people in the government as to what the decisions were, so that they would not get out of line.

I think McGeorge Bundy, who had even more direct responsibility for it than I, would agree with me. I hope there is nothing very inconsistent in what I have said. I profoundly think that we got ourselves into a dreadful mess and we have to get ourselves out of it. I hope we learned the right lessons from it. The right lessons are not that we ought to build a framework of legislation trying to impose a lot of restrictions and requirements on the President, because I think, however well intentioned, they are not going to do any good, and at some time they might rather get in the way of some useful things being done. I am just old enough to remember the Neutrality Act and the problems that it raised for the United States and the dangers that it posed for us at one time, which luckily we did not have to deal with. So, I would much prefer to let history sort out what any of us did within the Government and not try to justify it in personal terms. I think I have exposed my own views tonight as well as I could.

Professor RAY KNAPP. My question will be directed to Mr. George Ball. In his last statement he talked about Viet-Nam and termed it "a dreadful mess," a statement with which I would agree. However, earlier in his speech he seemed to portray a picture of Executive innocence; especially I refer to his statement about the American intervention in the Dominican Republic in 1965. As I recall, he said that when we first moved our troops in, it was merely to protect the Americans who were stranded and in distress there. Of course, it ultimately became much more than that. He also talked about the bombing of North Viet-Nam that started in February, 1965, as a sort of "Mosaic pattern of tit-for-tat," a retaliation for the Viet Cong attack on the American base at Pleiku; but this, of course, led to this dreadful mess which he talked about.

As a political scientist, I am rather skeptical about the innocence of the Executive Branch, whether it be that of Eisenhower, Kennedy, Johnson, or Nixon. I think that I sometimes have a feeling that there is a policy of deliberate deception, but, from my interpretation of your remarks, I would assume that what you are really telling us is that it is not really deception, it is a matter of bungling into a debacle, or a series of debacles, based on an unforgivable ignorance. My question is: Do you have any other ex-

planation than this to explain why we keep getting into various debacles such as the Bay of Pigs invasion, the Dominican invasion, the entrance into the Viet-Nam war itself, and the later incursions into Cambodia and Laos?

Mr. BALL. On the question of the Dominican Republic, I said something which I will say again and I think Mr. Bundy will reinforce it: What triggered the sending of American forces into the Dominican Republic was some very alarming telegrams and messages to the effect that there were American nationals in very real danger. We acted out of a real fear for their safety, and did what we felt was necessary in order to protect them. While I do not defend the ultimate results in the Dominican incident, the fact remains that we acted on what we felt was reliable information in order to protect American lives. Our motives were by no means sinister, and, given the same information, I think most people would have reacted quite similarly.

As to the beginning of the bombing of North Viet-Nam, this did, as I said, start as a reprisal for attacks on Pleiku. Again, this turned into something quite different, but that does not alter the fact that this type of reprisal was justified at the outset. In those terms, I think the Executive was "innocent."

Viet-Nam was a mistake, perhaps from the outset; the political and geographical terrain is simply not conducive to American military involvement. Any government is going to make mistakes; the problem is how to extricate yourself after recognizing your error. I do not know the answer, but neither do I think that it is contained in either of the bills proposed tonight.

Senator JAVRS. I think we have to find a better way to avoid the pitfalls into which we have fallen in the past. We need a more finely-honed instrument in the public domain to share the authority in the making of foreign policy. The people need to know more of the deliberative process; there has to be less of this closed-door policy-making based on the "superior" knowledge of the President. Let us bring some of these facts out into the open. New ground rules are needed in order to ensure this sharing of responsibility and I feel that the War Powers Bill is a strong first step in this direction.

Chairman ROGERS. Our thanks to our distinguished Panel for a very lively discussion on one of the most vital issues facing our nation today.

The meeting thereupon adjourned.

#### FOURTH SESSION

Friday, April 30, 1971, at 9:15 a.m.

#### **Conflicting Assumptions about International Trade: Neo-Protectionism or Reasonable Accommodation of National Interests?**

The session convened at 9:15 o'clock a.m. in the Congressional Room of the Statler-Hilton Hotel. Professor JOHN H. JACKSON of the University of Michigan Law School presided.

The CHAIRMAN, in his introductory remarks, noted that the problems of international economic scope are passing through a period of fundamental rethinking. To vastly oversimplify, post-World-War II economic policy has rested on three main pillars: fixed or almost fixed exchange rates, application of the most-favored-nation principle, and the reduction and eventual elimination of governmental trade barriers. Today, lawyers, economists, and political scientists are challenging each of these pillars. In this session the primary focus of attention is on the third pillar—the question of lower trade barriers. Have we reduced these barriers enough? Should we go further? Should we pull back?

From his own experience in the international economic sphere, he observed that the nation-state concept is breaking down as nations become increasingly interdependent economically. This breakdown poses a problem of the juxtaposition of competing policy goals. On the one hand there is the goal of obtaining the economic advantages commonly termed the "gains from trade." On the other, there is the desire of states to have the power to pursue diverse national goals. These may include goals such as the redistribution of income or consumer protection, or goals of a religious or aesthetic nature. The problem, at least superficially, is to what degree the opportunity remains for smaller groups of people, whether on a regional or national scale, to pursue the particular goals that interest the citizenry of those particular entities.

The Chairman then introduced the first speaker, Mr. Bruce E. Clubb, Commissioner, U.S. Tariff Commission.

#### **CONFLICTING ASSUMPTIONS ABOUT INTERNATIONAL TRADE: NEO-PROTECTIONISM OR REASONABLE ACCOMMODATION OF NATIONAL INTERESTS?**

*By Bruce E. Clubb \**

I would like to discuss with you this morning some recent efforts by the United States to tighten up the administration of some of its international trade regulatory laws. Before doing so, however, it is only fair to you

\* Commissioner, United States Tariff Commission.

and to my fellow Tariff Commissioners to state that I do not speak for the United States Government or for the Tariff Commission on this matter. I speak only for myself, and I have no reason to believe that any other Commissioner, or any other Government official of any kind, would agree with my analysis.

Some of my friends in the importing community have been very concerned of late about what they regard as a return to protectionism in the United States. As evidence of it, they point to the discussions in Congress about new tariff and quota bills and discussions in the Executive Branch and private circles about voluntary quotas. Some note that even the Tariff Commission, after years of holding the line against import restrictions, has joined the parade and is reinterpreting existing laws in a way which is more favorable to domestic interests. This combination of events, they argue, indicates that the United States is abandoning its traditional liberal trade policy.

I think this view is mistaken on two grounds. First, I do not believe that traditionally we have had a liberal trade policy, and second, I believe that recent attempts at administrative regulation of trade will probably be much less restrictive than what we have experienced over the past 35 years. Let me explain.

#### *I. United States Foreign Trade Policy: Liberal, Protectionist, or Neutral?*

Some time ago I attempted to test the hypothesis that the United States has had a liberal trade policy since 1934 when the Trade Agreements Program was begun. I began by assuming that if one has a liberal trade policy, restrictions on trade should be removed and imports should increase. Of course, imports have increased in absolute terms from about \$1.6 billion in 1934 to about \$40 billion in 1970, and this is indeed impressive. But one would expect imports to increase during this period even without trade agreements, for the same reasons that domestic business has increased—we now have a larger population and a richer market.

I made several other attempts to test the liberality of our trade policy statistically; first, by computing a ratio of imports to gross national product, and next by computing a ratio of imports to goods produced in the United States. It seems reasonable to assume that if we are making a conscious attempt to break down trade barriers, then imports should grow at a faster rate than the rest of our economy. Accordingly, the ratios of imports to GNP and imports to goods produced should get larger. But they have not. Rather, these ratios indicated to me that in all these years, with all our efforts at stimulating foreign trade, we have approximately the same relative dependence on imports in 1971 that we did in 1929.

This analysis seemed to suggest that perhaps our trade policy had not been as liberal as I had assumed, and so I went back over the foreign trade actions we have taken since 1934, comparing as I went the restrictions we have removed against the restrictions we have imposed. The results were very revealing and seemed to bear out what the figures have already told us. In the period from 1934 until World War II, a number

of bilateral trade agreements were made with individual countries, covering only a few categories of goods and a small dollar amount of trade. However, during this same period, Congress enacted the Sugar Act imposing quotas on imports of sugar. Thus, up to World War II, the score was about even. We had reduced restrictions on a small amount of goods, and imposed additional restrictions on an almost equal amount.

This balancing process of removing some restrictions while imposing others has been continued up to the present time. After World War II, the original GATT negotiations took place in which the United States granted concessions on trade equal to about \$1.7 billion. However, during this same period, we imposed restrictions on the importation of a large amount of agricultural goods, including cotton, wheat and dairy products. These restrictions had been authorized by earlier legislation, but only became effective after World War II. As we moved into the 1950's, small trade negotiations were held in 1949 (\$.25 billion), 1951 (\$.50 billion) and 1956 (\$.75 billion), which together covered about \$1.5 billion in trade. During this same period, however, the Short Term Cotton Textile Agreement was negotiated, which subsequently became the Long Term Textile Agreement, and which in recent years has, by itself, covered about a half billion dollars in trade. Moving into the 1960's, the Dillon Round resulted in concessions covering about \$1.75 billion in trade, but at about the same time restrictions were imposed on the importation of oil which in 1969 covered about \$2.2 billion in trade. Then came the Kennedy Round, the largest of them all, in which concessions were granted covering a total of \$8.5 billion in imports. On the other hand, shortly after the Kennedy Round, the Voluntary Steel Agreement was reached, placing an additional \$1.75 billion in trade under *de facto* restrictions. Other items are now also being considered.

The facts thus appear to indicate that we have not had a very liberal trade policy since 1934. Rather, it has been a neutral policy; a pragmatic policy where restrictions have been removed from some goods and imposed on others, on a case-by-case basis. Although we like to talk only about the restrictions we remove, the evidence suggests that in trade terms these are almost equaled by the restrictions we have imposed, with the result that we are probably no nearer free trade now than we were forty years ago.

## II. *Congress and United States Foreign Trade Policy*

One may well ask why Congress and the Executive Branch have felt it necessary to impose so many restrictions during this period. In my judgment, the answer is that Congress attempted to delegate responsibility for regulating foreign trade to various administrative agencies, but the agencies did not enforce the laws enacted by Congress, and accordingly, Congress found it necessary to take action itself. Let us look at the record. Among the first problems Congress attempted to deal with administratively was the problem of foreign export subsidies. Every tariff act since 1897 has contained a countervailing duty provision which provides in substance that when goods are imported into the United States, the production

or exportation of which was encouraged by a subsidy in the country of origin, then an additional duty equal to the subsidy will be imposed. The Secretary of the Treasury is to determine whether the imported goods have been subsidized, and, if so, is required to impose the appropriate countervailing duty. In effect, then, when a Congressman's constituent complains that he is being ruined by subsidized imports, the Congressman should be able to refer him to the Treasury Department secure in the knowledge that if the constituent's allegations are true, his grievances will be effectively redressed, and if they are not, this fact will be discovered and no action will be necessary.

In practice, however, it appears that the Treasury Department has rarely invoked this provision, and then only after a lengthy process which would have discouraged all but the most determined complainants.

The next foreign trade problem which Congress attempted to have settled administratively was dumping. The Antidumping Act was enacted in 1921. In substance it provides for additional duties to be imposed on goods which are sold at a lower price in the United States than in their country of origin, if these sales injure a domestic industry. Under this Act the Treasury Department determines whether such sales are being made, and the Tariff Commission determines whether the sales are causing injury to a domestic industry. In effect, then, Congress enacted a general dumping law so that it would not have to become involved in specific dumping cases. Theoretically, when a constituent comes to a Congressman and complains about dumped imports, the Congressman can refer him to the Treasury Department and the Tariff Commission, confident that the problem will be equitably resolved there.

I think it is fair to say, however, that until recently, the Antidumping Act was not very much enforced. For example, in the twelve-year period from 1954 to 1966, a total of 52 cases was referred by Treasury to the Tariff Commission—an average of about four per year. In these 52 cases the Commission found injury in only 13—an average of about one per year.

In 1922 Congress again tried to delegate a portion of its import problems to administrative agencies by enacting Section 337 of the Tariff Act, which for want of a better name has been called the International Unfair Competition Act. In substance, this Act provides a remedy for domestic producers who feel that they are being injured by the unfair methods of competition of foreign producers. Complaints are to be filed with the Tariff Commission, which is to conduct an investigation, and report to the President its findings of whether the statute has been violated. If a violation is found, the President may order that the customs authorities exclude the offending goods from entry into the United States.

The record of actions under this provision is similarly disappointing to Congress and to domestic producers. From 1936 until 1968—a period of 32 years—no affirmative actions were taken under this statute. Domestic producers who felt they were injured by the unfair practices of their foreign competitors finally gave up filing complaints because the chances of success were worse than slim; they were non-existent.

Despite this record of administrative failure to enforce legislation de-



signed to protect the domestic producer, Congress, in the Escape Clause legislation, again placed the fate of domestic interests in the hands of an administrative agency. As you know, prior to 1962 the Escape Clause provided in substance that if the United States reduces its tariffs in a trade agreement, and as a result imports increase to the point where a domestic industry is seriously injured, then the United States could raise the tariff back up again. The statute required the Tariff Commission to investigate complaints of domestic producers and left final action up to the President. Under this arrangement the Escape Clause was invoked 15 times during the period 1950 to 1961, roughly one and a half times per year.

In the Trade Expansion Act of 1962 Congress enacted a sweeping reorganization of the Escape Clause procedure. Pre-1962 legislation had provided only for tariff or quota relief, but the 1962 Act provides that the President may instead grant trade adjustment assistance (that is, loans, tax relief, and technical assistance to the injured industry) in order to assist the domestic producers and workers to get into another line of endeavor. The expectations of Congress and the nation were once again disappointed, however. In 27 cases brought to the Tariff Commission between 1962 and 1968, not a single petitioner could obtain a favorable decision.

Let us now look at the total situation presented by these four statutes designed to protect the domestic producer against injury from imports. Relief from bounty-fed imports has been virtually unavailable under the Countervailing Duty law. Until recently, relief from dumped imports was only rarely available under the Antidumping Act. From 1936 until 1968 no domestic producers got relief under Section 337 from the unfair practices of their foreign competitors. Finally, from 1962 to 1968, no relief was granted to anyone under the Escape Clause-Adjustment Assistance provisions of the Trade Expansion Act.

In a country such as ours, the voices of those injured and those who imagine they are injured by imports will be heard, either by Congress or by those to whom Congress has delegated the authority. Congress has wisely attempted to refrain from dealing with individual cases by enacting general laws and delegating the day-to-day application of the acts to administrative agencies or to the Executive Branch. But the agencies must enforce these laws if this process is to work. The laws granting relief to domestic producers are important escape-valves for pressures which are nearly always present. If complaints are handled on a case-by-case basis in such a way that the complainants have confidence in the administrative system, a little steam is permitted to escape at a time and no serious consequences will ensue. But if no relief is given for long periods, it is as though these escape valves had become clogged and the usual explosion can be expected.

This is what I believe has happened in the United States during the past twenty years. Those who rightly or wrongly believed they were injured by imports have become convinced that the administrative procedures

set up to handle such complaints are stacked against them. And the result of twenty years of no relief could also have been predicted: the parties who believe they have been injured return to Congress seeking relief directly from the body charged with the Constitutional duty to regulate foreign commerce.

### *III. Recent Administrative Efforts to Redress Grievances of Domestic Producers*

During the past two or three years the agencies of the Government have begun to enforce some of the regulatory laws which are designed to redress the grievances of domestic producers. For example, during the period from 1967 to 1970, 18 cases were referred to the Commission under the Antidumping Act, and in 15 the Commission found in favor of the domestic interests. Similarly, the Commission now has seven cases pending under the International Unfair Competition Act—a greater amount of activity than this statute has seen for years.

The greatest change in the administration of foreign trade legislation, however, has come under the Escape Clause and Adjustment Assistance provisions of the Trade Expansion Act of 1962. From the enactment of this law in 1962 until June 1969, a total of 23 petitions had been filed under this Act, and in all 23 cases relief had been denied by the Tariff Commission. But during the past two years, a more liberal interpretation of the Act by the Commission and the President has produced a vastly different result. From June, 1969, through April, 1971, a total of only 22 months, the Commission has received seven industry petitions, and has granted relief in four of them. It has received 13 petitions from firms; relief has been granted in seven, denied in four and two are pending. During this same period, the Commission has received a total of 83 petitions from groups of workers. It has granted relief in 41 cases, denied relief in 33 cases and has nine cases pending. In all, the Commission has received a total of 103 petitions under the Escape Clause and Adjustment Assistance provisions in the past 22 months. This is almost four times the number it received during the preceding seven years. Moreover, it has granted relief in a total of 52 of these cases, compared to none in the earlier period.

### *IV. Conclusion*

The cause of free trade does not gain by the failure to enforce these laws. History teaches us that, rather, the alternative to strong enforcement of the laws designed to protect domestic interests will not be freer trade; it will be a much more rigid and cruder form of restriction which will be imposed through other channels. In short, strict enforcement of these laws is not only consistent with a liberal trade policy, it is essential to it.

The CHAIRMAN thanked Mr. Clubb and then introduced the second speaker, Mr. John B. Rehm, of the District of Columbia Bar.

## HOW PROTECTIONIST ARE OUR IMPORT- RESTRICTION LAWS?

*By John B. Rehm \**

The topic of this Panel concerns two competing assumptions about, or approaches to, international trade. In my view, protectionism, including therefore "neo-protectionism," has at least two prime characteristics. It assumes that in most cases imports are the major cause of domestic injury and therefore demands little or no evidence that this in fact is the case. As a consequence, it places great faith in, and reliance upon, the use of import restrictions, with little heed to the domestic or international consequences of such actions. A "reasonable accommodation of national interest," on the other hand, I would understand as a policy of weighing the advantages and disadvantages to the public interest of possible actions affecting international trade.

For purposes of this panel discussion, I thought it might be interesting and hopefully provocative to see whether certain key provisions of U.S. law on international trade fall under the first or second heading. The provisions I have in mind are the ones most frequently invoked today to combat allegedly injurious imports. They are the Escape Clause (primarily sections 301 and 351 of the Trade Expansion Act of 1962), the Antidumping Act, 1921, the Countervailing Duty statute (section 303 of the Tariff Act of 1930), and the Unfair Trade Practices statute (section 337 of the Tariff Act of 1930). All four have attracted considerable attention in the last several years, and I propose to analyze briefly the manner in which they deal with four key concepts: the imports in question, their causal relationship to the alleged injury, the domestic entity in question, and the alleged injury itself. I should emphasize that I intend to give my current impressions about these concepts without attempting a scholarly analysis.

Turning to the first concept, then, how do the four statutes define the imports in question? In my judgment, they do so in a protectionist way. The Escape Clause does not distinguish legitimate from illegitimate import competition, whereas the other three attempt to do so. Setting aside the link with tariff concessions that is still in the law, the Escape Clause basically concerns itself with increased quantities of imports. However, it establishes no meaningful standard to determine when an increase is actionable, thus allowing a very modest increase to satisfy the law. The other three provisions have even more of a protectionist strain in this regard. Under the Antidumping Act, the critical issue of sales at less than fair value is left to the unbounded discretion of the Secretary of the Treasury. Over time, the concept of fair value has been aligned with the concept of foreign market value in the Act. Even so, the present antidumping regulations make it very difficult for a foreign manufacturer to know when he is selling at less than fair value, and this difficulty has

\* Of the District of Columbia Bar.

become quite serious recently with the Treasury Department's more aggressive enforcement of the Act. As for the Countervailing Duty statute, the words "bounty or grant" have an almost unlimited meaning and, construed literally, would probably apply to most U.S. exports. After a certain number of years in which the Treasury Department took a restrictive approach to those words, that approach has been challenged in the *Hammond Lead* case concerning litharge from Mexico, which is now under appeal. Similarly, the Unfair Trade Practices statute is terribly broad, and it is due only to a tradition that the section has, until recently, been invoked almost exclusively in cases of alleged patent infringement. Thus I would say that, in dealing with the imports in question, all four statutes are protectionist and do not provide a reasonably clear and objective definition of the phenomenon that will trigger their operation.

With respect to the second concept—causation, the Antidumping Act and the Unfair Trade Practices statute are decidedly protectionist, whereas the Escape Clause is ironically skewed too far in favor of liberal trade. The Antidumping Act asks only whether a domestic industry is being injured "by reason of" the imports sold at less than fair value. This test evades the critical question of the degree of causation and thereby permits any degree to be sufficient, consistent with a protectionist view. This is borne out by the fact that the question of causality has been virtually disregarded by the Tariff Commission. Commissioner Leonard is the first, to my knowledge, to recognize and try to apply the requirement of causation, as he has done in the recent decisions concerning ferrite cores from Japan and ceramic wall tile from England. The fact remains, nevertheless, that neither the Antidumping Act, nor its legislative history, nor its application by the Tariff Commission sheds any light on what degree and, more importantly, what minimal degree, of causation is required to satisfy the law.

The Unfair Trade Practices statute also fails to deal at all adequately with the question of causation. It asks whether the unfair trade practices have "the effect or tendency" to injure a domestic industry. The term "effect" is no better than the expression "by reason of," since they both avoid entirely the degree of causation. By contrast, the term "tendency" does imply some degree, but a degree so weak as to permit almost any import to satisfy this test. The Tariff Commission seems to have given the term this protectionist meaning in recent decisions under section 337 dealing with ampicillin and panty hose.

I called the Escape Clause ironic, because as it was amended in the Trade Expansion Act of 1962, it turned out to impose too strict a test of causation. The prior escape clause, as first enacted in the Trade Agreements Extension Act of 1951, asked whether the increased imports were a "substantial" cause of the alleged injury. In the abstract, the term "substantial" is a fairly defensible approach to this question. On the other hand, it is admittedly capable of being construed in a variety of ways. In the Trade Expansion Act of 1962, an effort was made to impose deliberately demanding standards of causation by the use of the concept

"the major cause." The legislative history sheds no light on the intended meaning of this term, but on the basis of a series of negative escape-clause findings by the Tariff Commission, a general impression was created that "the major cause" is the cause greater than all other causes combined. In time, a consensus emerged that this was an unrealistic test, and many questioned whether any increased quantity of imports, no matter how severe, could ever be said to be "the major cause" of alleged injury. Particularly in an economy as large and complex as our own, there are probably always too many other economic forces at work to permit such a conclusion. As a result, both the Johnson and Nixon Administrations proposed that a new term "the primary cause" be used, on the theory that "the primary cause" is the cause greater than any other single cause but not necessarily the cause greater than all other causes combined.

This brings us to the third concept, that of the entity that is allegedly being injured. In this case, in my view, the present Escape Clause and Unfair Trade Practices statutes deal adequately with the issue, whereas the Antidumping Act leans in the protectionist direction. The Escape Clause requires that the domestic industry produce an article that is like or directly competitive with the imported article. While the term "like or directly competitive" has on occasion created difficulties of interpretation, I would regard this as a fair approach to the problem of defining the industry in question. Moreover, the industry must be nation-wide. Under the old escape clause, geographic segmentation of a nation-wide industry was permitted, and, as a result, certain escape-clause actions were taken in the 1950's that related to very narrow segments of an industry indeed. In reaction to them, the Trade Expansion Act of 1962 expressly repealed the segmentation provision. The several affirmative, or potentially affirmative, findings by the Tariff Commission under the Escape Clause since 1962 do not elaborate the concept of a nation-wide industry.

The Unfair Trade Practices statute, like the Antidumping Act, also uses the term "an industry in the United States." Since most cases under this statute have concerned patent infringement, the industry has consisted of the patentee and his licensees or, where there are no licensees, the individual patentee. In other cases involving such unfair trade practices as passing-off and anticompetitive behavior, the industry has, to my knowledge, been considered to be the nation-wide group of firms allegedly injured by such practices. Moreover, this statute qualifies the term "industry" with words not found in the other statutes—"efficiently and economically operated." This, to my mind, is a reasonable requirement, and raises the interesting question whether an industry should be entitled to seek relief from imports in any event if it is not well operated.

The Antidumping Act uses the term "an industry in the United States." Unlike the Escape Clause, this Act does not require that the industry make a like or directly competitive product. Moreover, in the 1950's, the Tariff Commission, with no legislative authority of which I am aware, began to elaborate a concept of geographic segmentation in antidumping cases. In certain industries, like cement, for example, it argued that

because of transportation costs and other factors, a discrete sub-industry could be identified in a certain geographic area, and that it would be reasonable to consider the impact of imports sold at less than fair value upon that sub-industry. To my knowledge, however, there has not been an example of its application in the recent spate of affirmative determinations of injury under the Antidumping Act. Nevertheless, the Antidumping Act must be regarded as protectionist, in my judgment, in its loose approach to the concept of industry.

The fourth concept is the injury itself. In this case, I find the Escape Clause to be adequate, the Unfair Trade Practices statute questionable, and the Antidumping Act decidedly protectionist, particularly as it is being applied today by the Tariff Commission. The escape clause speaks in terms of "serious injury" or the threat thereof, and enjoins the Tariff Commission to take into account all economic factors which it considers relevant, including idling of productive facilities, inability to operate at a level of reasonable profit, and unemployment or under-employment. While the term "serious" is a helpful and, in my view, proper statutory guideline, it still leaves quite unclear the kinds of injury and threatened injury that the law is designed to cover. The Tariff Commission has not, to my knowledge, ever tried to establish any general definition of "serious injury," but has rather dealt with the term on a case-by-case basis. Nor has it ever articulated the notion of threat.

The Antidumping Act asks whether an industry is being injured, is likely to be injured, or is prevented from being established. "Likelihood of injury" is arguably less imminent than the "threat of injury," but I know of no gloss on the former term. Moreover, the notion of prevention from being established is very broad. In my own view, it is probably a worthwhile addition to the forms of injury that may justify import restrictions, but it demands some kind of clarification. Finally, the term "injured" is not modified by any adverb like "seriously," and here the Tariff Commission has not, in my judgment, helped matters at all. At one time, in recognition of the standard contained in Article VI of the GATT, it applied a concept of "material injury." More recently, a majority of the Commission has concluded, on what I find to be a very questionable analysis of legislative history, that any injury that is at all greater than insignificant injury will satisfy the statute. This to me is protectionism and does not attempt to keep the public interest in mind.

As for the Unfair Trade Practices statute, it asks whether the effect or tendency of the imports in question is to destroy or substantially injure an industry or to prevent the establishment of an industry or to restrain or monopolize trade and commerce. Leaving aside the aspect of restraint of trade, this statute at least attempts to qualify the nature of the injury by the use of the adverb "substantially." But this is a slippery word, as noted above. The statute also incorporates, as baldly as the Antidumping Act, the concept of prevention of establishment. In recent years, there have been very few affirmative findings by the Tariff Commission under this statute, and there has therefore been little opportunity to elaborate the

concept of injury, although last November's decision in the ampicillin case does not reassure me.

In discussing the three concepts of causality, industry, and injury, I have, of course, not referred to the Countervailing Duty statute, since it presently lacks a test of injury. It is interesting, however, to consider what the House Ways and Means and Senate Finance Committees would have done to that statute in this regard last year. In H.R. 18970, as approved by the former, and H.R. 17550, as approved by the latter, duty-free imports would have become subject to countervailing duties, upon a determination of injury by the Tariff Commission. To restrict the application of an injury standard to duty-free imports makes no sense to my mind. Beyond that, however, both bills would simply have taken the existing language in the Antidumping Act, without any attempt to think through the very issues I have been discussing. This is indeed neo-protectionism compounded, in my view, since the formulation in the Antidumping Act is already deficient and weighted unduly in favor of import restrictions.

In conclusion, I am troubled by the protectionist elements in the four statutes themselves and the neo-protectionist strains in their administration. The protectionism can be somewhat excused on the ground that three of the four statutes were enacted before the establishment of the Trade Agreements Program in 1934 and the successive efforts to create an international trading system that culminated in the General Agreement on Tariffs and Trade. It is nevertheless disturbing to me that last year's proposed amendments to the Countervailing Duty statute reflected such an unthinking approach to the problem. Nor was this Congress's fault alone, since this Administration clearly encouraged a protectionist attitude towards the question of injury by its parochial textile policy.

Beyond that, however, I am equally troubled by the neo-protectionist bent I find in the administration of these statutes, and especially the Antidumping Act and, I fear increasingly, the Unfair Trade Practices and Countervailing Duty statutes. This neo-protectionism disregards at least two important points. First, it is not sound policy to view imports as essentially bad and import restrictions as the optimum form of relief. Second, in recent years other countries have acquired both the ability and the will to take counter-measures against the United States. On both counts the public interest is not well served by neo-protectionism, and it therefore becomes increasingly important to formulate a balanced statutory and administrative framework for dealing with injurious imports.

The CHAIRMAN thanked Mr. Rehm, and then introduced the first commentator, Mr. Eugene L. Stewart, of the District of Columbia Bar.

Mr. STEWART noted that Mr. Rehm began with the premise that anything supporting the welfare of an industry is parochial, using the word "parochial" in the pejorative sense. Mr. STEWART argued that, on the contrary, it is in the national interest to give some protection to domestic industry in order to prevent disorder in trade.

He stated that when Mr. Rehm criticized what he called the "unbounded

discretion of the Secretary of the Treasury under the Antidumping Act" he is saying that he is dissatisfied with the results in some of the cases. However, when anti-dumping duties are imposed the importer has the right to go to the Customs Court for a trial *de novo* of the key concepts under which the dumping duties would be measured. Thus the discretion of the Secretary of the Treasury is strictly limited.

Mr. Rehm had stated earlier that administrative uncertainty amounts to protectionism, and he referred in particular to the countervailing duty statute which has not been meaningfully interpreted. Mr. STEWART argued that administrative uncertainty means a denial of relief, which makes corporations affected by unfair trade practices unwilling to make investments in the domestic economy.

Mr. STEWART expressed dissatisfaction with the system used in committee hearings dealing with trade bills. The people most affected, the domestic industries, come in and make a statement in public. Then the committees go into executive session where their opponents, the free trade philosophers of the agencies of the Executive Branch, *in camera* say what they think about what the industries say in public.

The CHAIRMAN thanked Mr. Stewart, and then introduced the second commentator, Mr. Monroe Leigh, of the District of Columbia Bar.

Mr. LEIGH termed plausible and persuasive Mr. Clubb's thesis that disappointments of those applicants who have sought and failed to secure administrative relief has generated heavy political pressures for legislative relief. More often than not legislative relief tends to be crude in form, inflexible in application, and worst of all it becomes a permanent feature on the trade landscape.

There is, moreover, a kind of bitterness derived from the fact that the statutory scheme has promised more than it can deliver. There is a tendency for any loser in a court of law to feel bitter. But in the trade field there is a special bitterness resulting from the fact that the responsibility for the administrative relief is unfortunately divided. For example, in an escape clause action, if an applicant is one of the lucky few who succeeds in persuading the Tariff Commission to recommend relief, the next step is for the recommendation to be reviewed by the President and his staff. At that point a battle develops within the Executive without the participation of the industry or the Tariff Commission. The President will be told that if relief is granted it will be viewed abroad as a move toward protectionism. He will also be told that issuance of the proclamation granting relief in one case will encourage other industries in the United States to apply, setting in motion a wave of protectionist sentiment which will create political difficulties for the President with Congress. There are other pressures on the President. In the *Watchmakers'* case the Swiss Government sent a note to the United States threatening not to participate in the Kennedy-Round negotiations unless escape-clause relief was withdrawn from the U.S. domestic watch industry. This relief was in fact withdrawn before the Kennedy Round began. These arguments which the President must consider do not purport to go to the merits of the question passed



upon by the Tariff Commission. These arguments, though extraneous to the merits of the case, are often the decisive ones. Applicants conclude that someone in the Executive Branch has had his thumb on the scales of justice. To lawyers the escape-clause action ends in what looks like a perversion of administrative due process.

Accordingly, Mr. LEIGH strongly supported a suggestion made by Mr. Clubb in another forum that these adjudicative functions should be speeded up, consolidated in a single agency, and should be made subject to judicial review.

Mr. LEIGH pointed out that Mr. Rehm failed, in his analysis of the four relevant statutes, to distinguish between the escape clause on the one hand and the Antidumping Act, the Countervailing Duty statute and the Unfair Trade Practices statute on the other. The latter three statutes are founded on unfair competition concepts, while the former has nothing to do with unfair competition. The latter impose their sanctions at the point of importation because the actual decision to dump, to subsidize, to infringe, or to monopolize typically takes place outside the territorial jurisdiction of the United States and the offending parties cannot be reached by U.S. legal process. The fact that the imposition of the only available sanction may exclude products from the U.S. market is incidental to the main purpose which is to maintain a fair market in the United States.

The CHAIRMAN thanked Mr. Leigh, and then introduced the third commentator, Professor Warren Schwartz, of the University of Virginia Law School.

Professor SCHWARTZ expressed the view that the four statutes in question represent a peripheral miscellany of cases with which Congress was not prepared to deal. Congress threw these cases to the Tariff Commission under statutes which recite the arguments on both sides, but which fail to resolve the difficult problems involved.

To compare the relative importance of cases dealt with under these statutes with cases which the Congress or the President have dealt with directly, Professor SCHWARTZ offered six examples of each type of case. Tariff Commission cases include stainless steel flatware, barber chairs, safety pins, pianos, chromic acid from Australia, and cement from the Dominican Republic. Cases in which Congress has imposed quotas or the Executive has entered into an international agreement, formal or informal, include oil, coffee, sugar, dairy products, steel, and textiles. Since most important cases are handled by the Congress or the Executive, their decisions should be the primary center of intellectual concern.

In the political arena there are two basic problems we should think about. First, there is the political process problem, which is not limited to the trade area. There are three groups concerned with international trade legislation: American consumers, foreign producers, and domestic producers. American consumers and foreign producers are vitally interested in liberalizing trade policy. However, they are poorly organized and disenfranchised, respectively, and therefore without substantial political

influence. Domestic producers, on the other hand, are well organized and geographically concentrated. Politicians from these areas of concentration must favor certain protectionist legislation. For example, it is not possible to be from Louisiana and to oppose the Sugar Act. The whole political process is skewed in favor of protectionism.

Another basic problem is that the poor legislation in the trade area obscures the basic economic issues. The following claims against free trade are the only ones even worth considering. First, we might consider favoring less developed countries either through a quota system or some system of preferences. Second, there may be certain restrictions necessary to accomplish the purposes of free trade. This claim is made in dumping and countervailing duty cases. Third, there is the agricultural problem which is essentially one of incomes maintenance. Farmers, embarrassed to receive direct payments, prefer to see the same result accomplished through manipulation of the market. Fourth, there is the national security rationalization which I have discussed at length elsewhere. Finally, there is the problem of the industry which is vulnerable to foreign competition in part, at least, by reason of restrictions imposed by domestic legislation. It is, for example, conceivable that, despite equality of technology and efficiency, an industry may not be able to compete with foreign competition because of the high labor costs which result from the position given American labor unions. These basic economic issues should form the focus of discussion. It is idle to take words such as "in major part" and engage in some kind of mystical exercise to determine what they mean, labeling the outcome, if we don't like it, "protectionism" and, if we do like it, "liberalism."

The CHAIRMAN then introduced the fourth commentator, Professor Ronald McKinnon, an economist with The Brookings Institution.

Mr. MCKINNON, speaking as an economist, first distinguished the viewpoint of the mercantilist from that of the classicist. The mercantilist view, in essence, is that exports are good and imports are bad. Therefore, trade policy should be designed to expand our trade balance—the excess of exports over imports. The mercantilist view has affected the way nation-states keep their international accounts, as shown by the fact that the sum of the world's deficits is much greater than the sum of the world's surpluses. The mercantilist philosophy shows up even in people who imagine themselves to be internationalists. These people believe that we should have a liberal trade policy in order to expand our exports to other countries. However, they still think of imports as a cost which must be born to achieve this export expansion.

Mr. MCKINNON prefers the classical position which views imports as desirable and exports as something we have to give up in order to obtain imports. Exports are produced with the sweat of our brow. The cheaper we can buy imports the better off we are. Consumer interests, in particular, are closely allied with the classical position. One of the surprising things is that groups that want to influence consumer interest, such as

Nader's Raiders and Common Cause, are strangely silent on protectionism. If these groups want to influence consumer welfare, the stakes are higher here than virtually anywhere else.

Looking at the statutes in question from the classical point of view, Professor MCKINNON first examined the escape clause under which domestic industry must show injury due to imports. The Government's response should be to permit certain inefficient industries to be phased out and to encourage the shift of resources into more efficient uses. The Government might try to make the shift in resources less difficult, but under no circumstances should it block the adjustment process through the use of tariffs, quotas, or other restrictions of this sort.

From the position of a classical economist, it is convenient to lump the Antidumping Act and the Countervailing Duty statutes together. Both deal with the sale of foreign goods at unusually low prices. The classicist would say that these low prices are desirable, even if the foreign producers are selling at higher prices in their domestic markets. The only economic consideration is whether these low prices are temporary or permanent. If there is a reason to believe that the low prices are a temporary device designed to drive out domestic industry in order to raise prices in the future, then the problem is one of cutthroat competition and it should be treated accordingly.

The Unfair Trade Practices Act is distinguishable from the other three statutes for the reason that most of the cases brought under this statute have concerned patent infringement. Insofar as we want to establish patent monopolies in the United States in order to encourage research and development in the future, we do not want these monopolies undermined through international trade. In summary, the classical economist would accept the Unfair Trade Practices Act as an adjunct to domestic patent policy. However, the other three statutes would be substantially weakened or done away with entirely.

In closing, Mr. MCKINNON commented on Mr. Clubb's position that the four statutes should be vigorously enforced in order to divert pressure on Congress for more sweeping protectionist legislation. He pointed out that one cannot consider individual industries in isolation. If protection is extended to a few industries, this inevitably increases the competitive pressure on unprotected industries. If protection is granted to some industries, the U.S. dollar appreciates relative to other currencies, and other countries will have more incentive to export in the unprotected categories. One cannot take each case as it comes. One must adopt a general equilibrium view. A partially liberalized trade environment is inherently unstable. Either there is a regression back to more protection, or a movement forward to complete liberalization. Of course, the latter position is preferred by classical economists.

The CHAIRMAN thanked Mr. McKinnon, and then opened discussion for questions from the floor.

Miss PATRICIA OTTO questioned the position Mr. Leigh had taken that the U.S. antitrust laws could not reach anti-competitive decisions made outside the United States.

Mr. CLUBB described the position taken by the Justice Department, using the following example: If two U.S. firms conspire to fix prices in the U.S. market, the Justice Department will prosecute them for violating the antitrust laws. If two Japanese producers combine in Japan to fix prices on sales in the U.S. market, the Justice Department will probably refer the problem to the State Department, hoping that a negotiated settlement can be reached. Then, if U.S. and Japanese firms get together in a joint venture in Japan to fix prices in the U.S. market, the Justice Department would prosecute the American and put him in jail again.

Professor SCHWARTZ pointed out that there is ample authority under the antitrust laws for the Justice Department to attack anti-competitive practices abroad which affect U.S. markets. Asking the State Department to negotiate with the foreign government concerned may simply be an attempt to persuade that government to proceed under its own laws protecting competition before action is taken in the United States.

Professor ANDREAS LOWENFELD expressed doubt that American firms are really concerned with anti-competitive practices by the Japanese. It is one thing, he said, to be worried about competing in export markets in a non-competitive setting. But when American firms compete at home against foreign firms who may combine to set prices, the effect was likely to be raised foreign prices and a kind of protection, rather than unfair competition for the domestic producers.

Mr. STEWART countered, using the Japanese television dumping case as an example. Japanese television manufacturers conspired to set high prices in Japan in order to finance their campaign to penetrate the U. S. market through unreasonably low export prices.

Mr. RICHARD FINE of the Justice Department stated that the antitrust laws cover any decision which affects the U. S. market irrespective of the geographic location of such decision. He reported that during the last year the Justice Department had in fact been involved in at least three separate cases involving foreign producers. When an investigation of a foreign producer is undertaken, the Justice Department operates under the OECD Notice Procedure under which all members of the OECD have agreed to notify each of the other countries of an investigation that affects one of their firms. Thus foreign governments are aware of the Department's investigations which affect their producers. The Department does not show favoritism to foreign producers; they are treated the same as domestic producers.

The CHAIRMAN added that the antitrust area was one of those areas that was to have been dealt with in the postwar system. The Havana Charter negotiated in 1947 and 1948 did have an elaborate chapter covering problems of monopolization. Of course, this charter never came into effect and this gap in the international economic system has remained.

Professor STEFAN A. RIESENFELD called attention to the problem of agriculture. One of the real dangers in the agricultural field is that E.E.C. export subsidies are computed in a fashion which tends to undercut American exports in foreign markets that were formerly served by them. He asked if Congress is aware of this problem and what it intends to do about this matter.

Mr. WALTER HOLLIS suggested a provision of GATT which might potentially be used to solve the problem. The provision of Article VI dealing with anti-dumping and countervailing duties permits, as an exception to the injury requirement, the imposition of countervailing duties under circumstances in which subsidies are hurting the trade of a contracting party with a third country.

Mr. HOLLIS asked Mr. Rehm's view of the comparative desirability of the use of export restraint agreements, whether between governments or between a government and the industry of another country.

Mr. REHM expressed concern about export restraint agreements, for they evolve in a political context in which little concern is given to the basic economic issues involved.

Mr. DAVID J. STEINBERG raised the question of the need for Government intervention both before and after an escape-clause action. There may be cases in which the Government should concern itself with the problems of an industry before "serious injury" occurs. For example, Government policy inequities which contribute to the problem should be removed at that time. If the problem has progressed further and "serious injury" is found, there should be a coherent, balanced Government adjustment policy with respect to that industry. Trade restrictions, if needed at all, should only be used to buy time until domestic remedies take effect and should be deliberately phased out as quietly as possible.

The CHAIRMAN interjected a question as to what degree the framework for the type of policy Mr. Steinberg suggests already exists in the adjustment assistance provisions of the escape-clause action.

The Panel was of the view that adjustment assistance has not been satisfactory. Efforts to co-ordinate various programs of Government assistance in these cases have not been successful.

Mr. MORRIS WOLFF asked for comments on the effect of O.F.D.I. restrictions on the ability of U.S. firms to compete abroad.

Professor SCHWARTZ pointed out that firms can simply borrow abroad, and therefore they are not seriously hampered by the restrictions.

Mr. MCKINNON countered by saying that O.F.D.I. restrictions do raise the cost of American firms doing business abroad; moreover, these restrictions tend to result in reactions by other countries. For example, in response to these restrictions on the flow of capital, Australia put limits on the amount of money U.S. firms can borrow in Australia. As a result, there is an absolute limit on the growth of U.S. investments in that country.

The question was raised from the floor as to whether the overseas operations of multinational corporations are or should be treated the same as foreign producers.

Mr. CLUBB answered that under the Antidumping Act no distinction is made between imports produced by United States and foreign producers. He pointed out that the interests of the American workers and the local communities had to be considered in addition to the interests of the stockholders of the U.S. firms involved.

The meeting thereupon adjourned.

### **Procedures for Protection of Civilians and Prisoners of War in Armed Conflicts: Southeast Asian Examples**

The session was convened at 9:15 o'clock a.m. in the Presidential Ballroom of the Statler-Hilton Hotel. Mr. JOHN CAREY of the New York Bar, as Chairman of the panel, opened the meeting by suggesting that attention be focused on the following questions: By what procedures could the tragedy of My Lai have been avoided and could such tragedies be avoided in the future? By what procedures can American prisoners of war in North Viet-Nam and other prisoners of war be assisted now and in the future? By what procedures, if any, could the slaughter of civilians in Hué and other mass killings of noncombatants have been avoided? By what procedures can the torture of prisoners of war to obtain information be avoided, and by what procedures can assassinations and mistreatment of civilian officials in the local governments by insurgent groups be controlled? Mr. CAREY then introduced the panelists.

## **PROCEDURES FOR THE PROTECTION OF PRISONERS OF WAR IN VIET-NAM: A FOUR-WAY PROBLEM**

*By Howard S. Levie \**

I doubt very much that I am going to answer very many of the Chairman's questions, for the very good reason that I do not think we need procedures. We *have* the procedures; what we need is compliance.

It seems to be an idiosyncrasy of many American intellectuals that they can enumerate in detail every violation of the law of war of which the United States or its allies in Viet-Nam are allegedly guilty, but that they maintain a studied silence with respect to the often far more horrendous violations of which the other side is clearly, and sometimes even admittedly, guilty. I hold no brief for any state which, or any individual who, violates the law of war. I believe that all violators and all violations should be equally condemned, without regard to the popularity or unpopularity of a particular course of political action. As I do not claim membership in the elite group which I have mentioned, this is exactly what I propose to do; and this is the reason why I have given this presentation the subtitle "A Four-Way Problem."

\* St. Louis University School of Law.

*Prisoners of War Captured by South Viet-Nam*

Early in its unfortunate involvement in Viet-Nam, the United States found there the identical problem that it had found in Korea a decade and a half earlier. As in many other newly independent countries, South Vietnamese officials, both civilian and military, had very little actual awareness of the conventional humanitarian rules protecting individuals who had become prisoners of war, even though their government had, more than ten years earlier, in 1953, acceded to the 1949 Geneva Prisoner-of-War Convention.<sup>1</sup> It was therefore necessary for the United States to conduct a concerted campaign in order to convince the South Vietnamese Government of the urgent need to adopt a national policy requiring its armed forces to comply with the provisions of the convention; and once that had been accomplished, it was necessary to undertake an extensive program in order to educate the members of the South Vietnamese armed forces as to the rules governing their handling of prisoners of war. Unquestionably, this educational program has not been 100% successful; but if you compare both the quantity and the content of the newspaper stories of prisoner-of-war atrocities committed by the South Vietnamese which appeared in 1965 with those which appear today, you will find the difference substantial.

Unfortunately, no matter how much training the troops receive, no war has even been, nor ever will be, conducted at a level of legal perfection. Atrocities against prisoners of war by the South Vietnamese undoubtedly continue to occur, particularly at the time of capture and during the evacuation to the prisoner-of-war camps. But these are acts of individuals and similar acts will be found to have been committed by individuals on both sides in every war. It appears that the Government of South Viet-Nam has probably been derelict in its duty to identify and punish the individual members of its armed forces responsible for these incidents; at least, any such punishments have not been publicized if they have, in fact, occurred. But the national policy continues to call for compliance with the convention and it is to be hoped that the effectiveness of the continuing campaign to educate the troops will become more and more evident.

Once the prisoner of war reaches the camp where he is to be interned, treatment according to the provisions of the convention is ensured not only by the declared policy of the South Vietnamese Government and the training which the guard personnel have received, but also by the inspections made by the representatives of the International Committee of the Red Cross. Here is a typical extract from a recent issue of the *International Review of the Red Cross*:

. . . . [T]he delegates and doctors of the ICRC in the Republic of Vietnam visited the prisoner of war camps of Qui-Nhon, Can-Tho,

<sup>1</sup> 6 U.S.T. 3316, 75 U.N.T.S. 383. It would almost seem that many of the new nations consider accession to certain multilateral treaties to be a "status symbol," similar to membership in the United Nations.

Pleiku and Bien-Hoa, administered by the [South] Vietnamese armed forces. In each of these places of detention, they were able to speak without witnesses with prisoners of their choice.<sup>2</sup>

I wonder what the reaction here would be if the ICRC were able to make and publish a similar statement about its activities north of the 17th parallel?

### *Prisoners of War Captured by the United States*

In the early days, before substantial U.S. involvement in Viet-Nam, the major charge made against this country was that it permitted the South Vietnamese troops to violate the humanitarian rules protecting prisoners of war. While U.S. military advisers did undoubtedly witness numerous illegal acts committed against prisoners of war, there was little that could be done except the use of moral suasion.<sup>3</sup> As has already been seen, this road was followed, with an eventual considerable degree of success.

It would be too much to expect that individual members of the United States armed forces have not on occasion been guilty of illegal conduct with respect to prisoners of war taken in Viet-Nam. That they have been, and that they have been tried and punished for their acts is evidenced by a number of opinions to be found in the *Court-Martial Reports*.<sup>4</sup>

The United States maintains no prisoner-of-war camps in Viet-Nam, this function being performed exclusively by the Republic of Viet-Nam. Accordingly, enemy personnel captured by United States forces are turned over to the South Vietnamese for internment. Two years ago, from this same platform, a speaker who was sincerely attempting to present a balanced picture of the problem, made an erroneous statement with respect to this procedure which has, so far as I am aware, gone uncorrected. He stated that

... American forces continued to turn prisoners over to their South Vietnamese allies despite the failure to secure their compliance with the laws of war. This constituted a violation of Article 12 of the Prisoners Convention.<sup>5</sup>

Article 12 provides that the Capturing Power may transfer the custody of prisoners of war to another Power which is also a party to the convention and which is considered to be willing and able to apply the convention; but that if the Power which receives the prisoners of war fails to carry out the provisions of the convention—obviously, with respect to the transferred prisoners of war<sup>6</sup>—the Capturing Power must either secure the

<sup>2</sup> 11 Int. Rev. of the Red Cross 32 (No. 118, Jan. 1971).

<sup>3</sup> Levie, "Maltreatment of Prisoners of War in Vietnam" in 48 Boston U. Law Rev. 323, 338-339 (1968).

<sup>4</sup> E.g., United States v. Griffen, 39 C.M.R. 586 (1968); United States v. Schultz, 39 C.M.R. 133 (1969).

<sup>5</sup> Farer, "The Nuremberg Trials and Objection to Service in the Viet-Nam War," in 1969 Proceedings, American Society of International Law 140, 153.

<sup>6</sup> Pictet, Commentary on the Geneva Convention relative to the Treatment of Prisoners of War 137-138 (1960).



correction of the situation or request the return of the prisoners of war to its custody.

As has been noted, the violations of the convention by the South Vietnamese occurred before the captured individuals reached the prisoner-of-war camps. Originally, the United States was turning prisoners of war captured by its forces over to the South Vietnamese in the field, leaving the task of evacuation to the latter. As soon as it was found that a number of these prisoners of war could not subsequently be accounted for, a material change was made in the procedure to be followed, the U.S. forces keeping custody of the individuals captured by them, and evacuating them to the rear, the turnover to the South Vietnamese occurring at the prisoner-of-war camps.<sup>7</sup> Once they reach these camps, the conditions of their confinement and South Vietnamese compliance generally with the convention and accountability, have been and are under the surveillance of the International Committee of the Red Cross, as we have already seen; and while that organization has found some violations, these have usually been administrative in nature. In other words, since at least May, 1966, when the problem came to light, and almost three years prior to the statement made from this platform, the United States has been following a procedure which ensures that prisoners of war captured by its armed forces and turned over to the South Vietnamese authorities for internment are treated in accordance with the convention.

#### *Prisoners of War Captured by the Viet Cong*

If the discussion which follows is limited to captured U.S. military personnel, it should not be thought that the plight of the South Vietnamese military personnel captured by the Viet Cong or the North Vietnamese has been overlooked or disregarded. But here in this country we have received very little information in this respect, either from the governments or from the news media. The North Koreans explained the disappearance of some 50,000 South Koreans who had been captured by stating that they had been "re-educated" and then "permitted" to enlist in the North Korean armed forces. A similar educational miracle appears to be occurring in Viet-Nam both north and south of the DMZ. In this respect the Vietnamese on both sides are violating the convention if the hostilities in Viet-Nam constitute an international war. They are probably violating the spirit but not the letter of the convention if those hostilities constitute only a civil war—a concept which, at this point in time, it is rather difficult to accept.

There is not much to be said with respect to the treatment of prisoners of war by the Viet Cong as there is so little public knowledge in this area. We know that the NLF has denied that it is bound by the convention. It cannot, however, free itself from the restrictions imposed by the customary law of war. We know that the handful of men who have escaped from Viet Cong captivity have told stories of being kept in underground hideouts, of being inadequately fed, and of being moved from place to

<sup>7</sup> Levie, note 3 above, at 339-340. The current regulation so providing is par. 3b, MACV Directive No. 190-3, May 12, 1970.

place. We know that the Viet Cong have summarily executed at least three American prisoners of war as reprisals for the execution of convicted terrorists by the South Vietnamese. We do not know exactly how many prisoners of war are actually being held by the Viet Cong or the identity of those prisoners of war.

*Prisoners of War Captured by North Viet-Nam*

There is little that can be added to the almost daily stories which appear in the news media with respect to the treatment of American prisoners of war held by the North Vietnamese, all as a result of what may well prove to be an ill-advised publicity campaign. North Viet-Nam has, of course, denied the applicability of the convention, despite the fact that armed conflict certainly appears to be taking place in Viet-Nam and despite the fact that Article 2 (international armed conflict) and Article 3 (armed conflict not of an international character) were intended to cover every possible situation of armed conflict which might arise. The argument upon which this denial of prisoner-of-war status has been based has varied from time to time. But there is one argument currently being advanced which should cause every humanitarian-minded person in the free world to pause and reflect, not only with regard to Viet-Nam, but with regard to all future armed conflicts.

The 1955 Report on the Geneva Conventions made by the Senate Foreign Relations Committee included the following oracular statement:

. . . in the light of the practice adopted by the Communist forces in Korea of calling prisoners of war "war criminals," there is the possibility that the Soviet bloc might adopt the general attitude of regarding a significant number of the forces opposing them as *ipso facto* war criminals, not entitled to the usual guaranties provided for prisoners of war. . . .<sup>8</sup>

The conflict in Viet-Nam has clearly revealed that the Korean experience was not unique and that, despite Soviet statements made at and after the 1949 Diplomatic Conference to the effect that captured military personnel would be entitled to treatment in accordance with the convention *until tried and convicted of a pre-capture offense (i.e., a war crime)*, by the use of sophistic logic, North Viet-Nam has been able to, and undoubtedly will continue to, justify, at least to some countries, a denial of prisoner-of-war status to any and all captured personnel.

Adopting a philosophy somewhat akin to that of the "just war," any armed conflict directed against a Communist entity, such as North Korea, North Viet-Nam, or the Viet Cong, is automatically a "war of aggression" and automatically and immediately makes every participant on the adverse side a war criminal.<sup>9</sup> That this doctrine is seriously urged and, at least

<sup>8</sup> Senate Committee on Foreign Relations, Geneva Conventions for the Protection of War Victims, S. Exec. Rep. No. 9, 84th Cong., 1st Sess., at 28-29.

<sup>9</sup> ". . . the mere killing of one country man of ours, whether combatant or not, even with a rifle shot, the mere destruction of a hut, of a bush in our countryside, is enough to turn the American pirate into a criminal . . ." Juridical Sciences Institute, U.S. War Crimes in Viet-Nam 203 (Hanoi, 1968). It is pertinent to note that

to some extent, is accepted as correct and proper was demonstrated by events which transpired in the Third Committee during the 25th Session of the General Assembly of the United Nations. In the course of the discussion of the Secretary General's two reports on the subject of "Respect for Human Rights in Armed Conflict,"<sup>10</sup> the statement was made that combatants captured by the forces of the Viet Cong and North Viet-Nam were entitled to prisoner-of-war status and treatment. The rapporteur summarized the pertinent ensuing debate as follows:

15. Many other delegations, however, claimed that, far from qualifying as prisoners of war under the relevant Convention, members of the United States armed forces captured in Viet-Nam were aggressors who should be punished for their acts. . . .<sup>11</sup>

Two conclusions may be drawn from the foregoing: (1) that a participant may unilaterally characterize a Power with which it is involved in armed conflict as guilty of making a "war of aggression" against it; (2) that individual members at all levels of the armed forces of the Power so characterized are *ipso facto* war criminals and are not entitled to prisoner-of-war status, without regard to their individual compliance with the law of war. This is *not* the law of Nuremberg, nor of the other post-World-War II crimes trials.<sup>12</sup> It is *not* the law as envisioned by the great majority, if not all, of the national representatives who participated in the drafting of the 1949 Prisoner-of-War Convention at the Geneva Diplomatic Conference. It is *not* the law as interpreted and applied by the International Committee of the Red Cross. If it is the law today, then the work done at Geneva in 1949 was a mockery and a waste of time; one-sided application of its provisions, which we have seen in Korea and in Viet-Nam, will soon cease to be the practice, and we will return to the rule as it existed many centuries ago, when prisoners of war lived or died as their captors decreed.

Chairman CAREY then thanked Colonel Levie for his remarks and said that the Panel's focus would next turn from the subject of procedures for the protection of prisoners of war to the subject of procedures for the protection of civilians in armed conflicts, still using Southeast Asian examples. One procedure for the protection of civilians, he said, is criminal prosecution, used most notably in the *Calley* case; Professor Gottlieb would call attention to other alternatives.

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the reservations made by all the members of the Communist bloc, including North Viet-Nam, to Art. 85 of the 1949 Prisoner-of-War Convention were specifically restricted to war crimes and crimes against humanity and omitted crimes against peace.

<sup>10</sup> U.N. Docs. A/7720, Nov. 20, 1969, and A/8052, Sept. 18, 1970.

<sup>11</sup> Report of the Third Committee, Doc. A/8178, Dec. 4, 1970.

<sup>12</sup> In its "Formulation of the Nürnberg Principles," the International Law Commission dealt with Crimes against Peace in Principle VI. The commentary on this Principle contains the following statement: ". . . Some members of the Commission feared that everyone in uniform who fought in a war of aggression might be charged with the 'waging' of such a war. The Commission understands the expression to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the Tribunal." 1950 I.L.C. Yearbook (II), 376.

## MEASURES TO PROTECT NONCOMBATANTS

*By Gidon Gottlieb \**

Mr. Chairman, you charged us to review the adequacy of procedures for the protection of civilian populations in the Indochina conflict. Truly terrible questions do arise in the wake of former Lieutenant Calley's trial. But, with your permission, I shall deal primarily neither with the question of criminal sanctions nor with that of abuses and unauthorized violations of the laws of war in the field. These are undoubtedly important and weighty matters which fully deserve the wide consideration they have already received. Rather, I would like to address a cluster of distinct problems:

What measures can be taken to ensure the effective *transmission* and implementation of directives incorporating the laws of war to the forces in the field? How can their implementation be rendered as effective as the execution of military orders generally?

What minimum standards and guidelines should govern the formulation of military practices and policies, the selection of targets, the choice of ordinance, the care and treatment of refugees, the wounded and the sick and the formulation of the classified rules of engagement?

How could government machinery be designed to monitor and review military practices and procedures under such standards and guidelines without jeopardizing national security requirements?

Should the United States act unilaterally in these matters or should it await the adoption of binding international instruments? How do domestic reforms fit in with international efforts to reaffirm and develop the laws of war under the authority of the United Nations and of the International Red Cross?

To investigate these difficult questions I believe it may be helpful to review concrete model proposals designed to stimulate discussions leading to improvements in the protection of civilian populations in time of war. President Nixon has told the nation that he is prepared to wage air warfare in Indochina for years to come. The Senate Subcommittee on Refugees has issued reports on the havoc this warfare has already inflicted. The Presidential announcement imposes a most urgent task: the development of standards and procedures to limit the killing and maiming of civilians and the generation of hundreds of thousands of new refugees; to bring up to date the famous Lieber Instructions which had been issued to the armed forces at the time of the Civil War. Indeed, not to take such measures now, in full knowledge of what has already happened, is tantamount to permitting the wholesale slaughter of innocent multitudes to go on unchecked. President Nixon's announcement requires the adoption of measures designed to keep American war policies *unquestionably* within the bounds of humanitarian and legal obligations. It requires standards to reduce the incredible toll of life of a people for whose self-determination we are purportedly in combat. No more urgent task faces

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us than the consideration of measures designed quite literally to save lives and perhaps also the survival of whole tribes and peoples.

*For a revision of the Lieber Instructions.* The broad principles and standards of international law set out in international declarations, treaties and conventions are but weak barriers within which to contain imperious arguments of a military character. The most effective way, in my judgment, to regulate the conduct of warfare by American forces is to inject the laws of war into the mainstream of *military* orders and directives of the armed forces rather than to await the conclusion of new treaties, of difficult compromises with foreign Powers, many of which we know stand ready to violate their most solemn engagements. Over a century ago, the United States acted alone at a time when the rules of international law had not crystallized; this is a procedure that we may choose to follow at this time again. It is therefore urgent that

a precise recommended code of practices (minimum rules of engagement) for the protection of noncombatants translating broad juridical principles into express prohibitions and specific directives be worked out in co-operation with the armed forces *and be made directive*;

an effective Military Practices Review Board be established to monitor and review military policies on the basis of these principles and that it operate within the National Security Council structure in order not to jeopardize national defense requirements.

The original *Instructions for the Government of the Armies of the U.S.A. in the Field* were issued in General Order No. 100 with the consent of President Lincoln. These were based on the famous Lieber Instructions drawn up by a law professor at the Columbia Law School. It is now necessary that new instructions to the Armies of the U.S.A. be issued reflecting the changes in the conduct of warfare that have taken place since Professor Lieber drew up his proposals. It is further necessary that separate instructions be issued to the Air Force to govern a mode of combat to which the laws of land warfare can scarcely apply. It is necessary that these instructions be issued in the form of a general order to all armed forces. At the present time, most rules of engagement governing the operation of our armed forces are classified. The present *Manual on the Law of Land Warfare* does not purport to be directive. The revised Lieber Instructions should lay down boundaries within which rules of engagement may be drawn up. The revised Instructions must at a minimum govern the selection of military targets; the ordinance used in prosecution of the war; the relocation of civilian populations and the resettlement of refugees; the care and treatment of the injured and the wounded; the adoption of military policies such as free-fire zones; the transfer of responsibilities to allied nations which do not themselves fully comply with the laws of warfare.

These instructions must be capable of providing precise guidelines for responsible officers, for officials and ambassadors involved in these matters as well as for our allies. They must set the standards to which they will be held and for violations of which they will be asked to account in the *same manner* in which they would be held to account for disobedience

to any other military orders. They should therefore be adopted by the Department of Defense and the Joint Chiefs of Staff as the minimum rules of engagement which no military officer would have, by virtue of appropriate military orders, the right to disobey. The same techniques which the armed forces now so effectively employ to transmit and enforce military orders and directives should also be employed for the effective transmission and enforcement of the laws of war. I cannot understand why the transmission and enforcement of the laws of war must be more difficult than that of other military orders. Compliance with the laws of war should not merely be a matter of education—the laws of war, unlike the laws of the church, are not only binding men's consciences. They should be enforced like all other military orders; their violation should lead to charges of insubordination, of refusal to obey orders. If the armed forces feel that such a step would set the clock back in the sense of putting too much emphasis on orders and too little on voluntary compliance, I would respond that experiments in voluntary compliance should first be conducted in other areas, in the maintenance of equipment, for example. It has been pointed out that when war was carried out by a warrior caste, rules were generally observed. For the observance of rules military forces must be highly disciplined. To lay down rules under present conditions in which the nation maintains huge armed forces, makes it very difficult for the military to conduct war humanely. The law of war should not be something exterior and apart from the military orders every soldier is bound to obey; they should be the most highly binding orders of all.

Until such minimum rules are adopted, Congress may wish to scrutinize past military policies in the war in Indochina on the basis of the *Draft Rules of the Red Cross for the Limitation of the Dangers to Civilian Populations* and suggest such changes in these policies as it may deem necessary. Congress should moreover draw the attention of senior officials of the U.S. Government and of senior officers of the armed forces to the standards established in the Red Cross rules and to the principles of international law restated by the Institute of International Law on the nature of military targets as they relate to air warfare in particular.

In developing appropriate procedures and standards five points should be made:

1. The standards or minimum rules of engagement (revised Lieber Instructions) need not necessarily be legislated and made into law; it is enough that they be developed in co-operation with the Department of Defense and the Department of State and issued in the form of directives or of a General Order.

2. The standards or minimum rules of engagement (revised Lieber Instructions) should be based but need not be identical with the rules developed by the International Committee of the Red Cross and other instruments declaratory of international law binding on the United States.

3. The Congress need not to await adoption of standards by the international community in the form of international conventions before de-

ciding to develop in co-operation with the armed forces a code of practices for the protection of civilians.

4. The interpretation and application of standards, minimum rules of engagement (revised Lieber Instructions) should be monitored and military policies should be reviewed by an appropriate *independent* agency such as the proposed Military Practices Review Board (see below) within the National Security Council structure.

5. The standards should also be explicitly accepted by all foreign recipients of U.S. military and economic aid and machinery should be agreed upon in instruments making such aid available to monitor and review their application as well as to provide emergency assistance through appropriate international channels to civilian populations in armed conflicts.

I shall now if I may, elaborate on these five points. *First*, the effectiveness of standards and procedures regulating armed conflicts does not primarily rest upon legislation. Neither Congress nor the courts are likely to secure compliance by the Executive Branch under the threat of sanctions. The effectiveness of measures designed to protect civilian populations would essentially rest upon the resolve of the Administration to be bound by them and to make them obligatory for the armed forces. Effective minimum rules of engagement for the regulation of the armed forces and procedures for administering them should therefore be developed *in co-operation* with the Department of Defense and the Department of State. The original Lieber Instructions were adopted as a General Order; they were not enacted into law. Minimum rules of engagement might be given additional weight by Congress which could incorporate them in a sense-of-Congress resolution. There is no necessity, however, to legislate these standards into law nor to seek at this time to enforce them by penal sanctions beyond those already provided for in the *Uniform Code of Military Justice*. Such legislative programs would merely delay the adoption of measures needed urgently.

*Second*, minimum rules of engagement for the protection of civilian populations (revised Lieber Instructions) should initially be based upon the "Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, 1956" developed by the International Committee of the Red Cross and submitted to governments by the International Red Cross Conference in New Delhi in 1957, simply because they represent the outcome of a careful and realistic international effort. The Red Cross text reflects an expert consensus on rules compatible with international law and the conditions of modern warfare. The careful elaboration of these rules prior to the Conference in New Delhi recommends them as a starting point for the design of appropriate standards. It is to be hoped that the Administration will now be disposed, after some fifteen years' delay, to respond to the Red Cross and to comment on these rules.

The Edinburgh resolution of the Institute of International Law as well as the resolution of the General Assembly of the United Nations on Human Rights in Armed Conflicts, adopted without opposition, are evidence

of rules and principles binding on all states. The Edinburgh resolution is not obligatory as such, but is declaratory of binding international law norms. These texts are therefore important sources of standards for the regulation of armed conflicts in which the United States may take part.

This country was the first to issue a General Order to its armed forces to affirm standards of civilization. The Draft Rules of the Red Cross are already in existence; efforts to codify the law have already been made; much of the technical work has already been done. It is now time for action, to make use of these instruments, to give them life, to adopt new minimum rules of engagement, to revise the Lieber Instructions, to move from protest to reform.

*Third*, the Congress need not await the conclusion of international treaties by the Administration before deciding to propose a code of recommended rules for the protection of civilian populations. The United States did not do so when it first acted on the Lieber proposals; it need not do so now. Such rules must be followed not by virtue of any agreement with other nations, not for the sake of some *quid pro quo*, but for their own sake. For the sake of the honor of our armed forces and the soul of the nation. These are rules which we should follow even if we were the only country in the world to follow them. This position is itself confirmed by international law which prohibits retaliation and reprisals against civilian populations. Measures the Congress may decide to adopt to protect civilians need not await international agreement any more than domestic repression of the trade in narcotic drugs need await the conclusion of international treaties in the matter. That is why I would like to repeat that the most effective way to regulate the conduct of warfare by American forces is to introduce a revised version of the Lieber Instructions into the mainstream of the orders and directives of the armed forces rather than to seek at this time new international agreements which by their very nature are bound to remain vague and ambiguous.

*Fourth*, Congress should request the President to establish in the National Security Council structure a Military Practices Review Board for the protection of civilians and for compliance with the minimum rules of engagement. This Board would be designed to review military policies, tactics and procedures on the basis of such rules issued as army directives. It would be called upon to assess and propose changes as needed in general policies such as search and destroy missions, area bombing, the relocation of civilians, free-fire zones etc., to monitor the application of directives for the selection of targets and the ordinance used on these targets. It would be required to review in close co-operation with responsible officials peculiarly deadly patterns of warfare. The Board could also review directives issued to persons like the Ambassador in Laos on the selection of targets and ordinance for the Air Force. It would be designed to give concrete institutional expression to the dictates of law and humanity in the conduct of the war and in the appraisal of military requirements. Such a Review Board should be appointed by the President in consultation with the appropriate committees of the Congress. It should



be composed of high-level officials in government as well as of recognized non-governmental experts on humanitarian problems and international law.

Nothing would prevent Congress from establishing at the same time an organ of its own to satisfy itself that armed conflicts are conducted in accordance with standards it has set and that no new legislation is needed for the regulation of the armed forces. Congressional review of policies and tactics adopted in waging the war would assist the armed forces to defend their honor and integrity against barbarous practices of warfare.

*Fifth*, there is yet another matter on which tangible concrete progress could be made for the protection of civilian populations. It will not have escaped attention that while manuals on the law of land and naval warfare are in existence, none has been issued on the law of air warfare. The Department of the Air Force may now wish to give fresh consideration to the publication of such a manual. It may, moreover, consider devoting at the Air Force Academy the same attention that is devoted to international legal studies at the Naval War College. There is no reason that in the matter of international law the Air Force should lag behind the Navy. Surely, this is one area in which inter-service rivalry would be welcome.

*Competing policy considerations.* Before discussion begins, I would like to point to some policy considerations that must inform a reassessment of procedures for the protection of civilian populations in wartime. These are not easy to order and to structure; they belong to different strata of arguments, to different families of concepts and considerations, high among which rank national security requirements that cannot be kept out of any realistic weighting of policies. These requirements as perceived by defense specialists must always be balanced against the competing demands advanced on the basis of the following policy considerations, that for the sake of brevity I shall summarize in outline form:

1. The duty of the United States Government to preserve and realize American commitments to the ideals of law and humanity; to stand fast by the determination to protect the principles and the society contemplated in the Constitution and in the Bill of Rights; to remain true to the aspirations underlying the preservation of individual life, liberty and happiness;

2. To respect paramount moral principles *for their own sake*, regardless of reciprocity, and for the sake of preserving American national ideals reflecting commitments to respect for fundamental moral values;

3. To affirm fidelity to the law, disregard of which would lead to the emergence of executive despotism and to the degeneration of constitutional rule;

4. To affirm respect for the legal and humanitarian principles on which claims for the protection of this country's prisoners of war rest;

5. To encourage by example reciprocity from allies and from enemies who may be deterred from engaging in barbarous acts in the full view of the media of mass communications;

6. To maintain law, order and justice in the armed forces for the sake of their honor and morale no less than in order to protect the Republic

from the spread of unprincipled and lawless military cadres such as overthrew the French Republic after its wars in Indochina and Algeria;

7. To maintain the conditions and the climate necessary for an international order which is designed to substitute negotiations and law for force and violence;

8. To honor the famous maxim of the Seven Sages of antiquity: "treat an enemy as a future friend" so as not to close the door to reconciliation and peaceful co-existence;

9. To create conditions under which a free people can support the Government in the conduct of its foreign policy. The shrewdest power politics will fail to secure support unless informed by a dimension of compassion and humanity;

10. To use weapons and policies of warfare that will not plunge the nation into a new era of isolationism by provoking excruciating feelings of horror and of guilt;

11. To provide firm and clear guidance to the lower ranks of the armed forces removing the dichotomy between the laws of war and military orders;

12. To demonstrate by example from the highest level of government concern for individual human life, of friend and of foe, as well as to demonstrate by example compassion for the innocent and concern for their care.

Nothing in these policies detracts in the least from the imperative necessity for nations to renounce force as a means of settling disputes, to agree to reduce armaments and to establish peaceful and confident relations amongst themselves. But, as the President of the International Committee of the Red Cross has pointed out,

Until such time as these objectives have been achieved—and so long as the scourge of armed conflicts, even of a limited nature, continues to subsist or to arise—it is however of paramount importance that the humanitarian rules destined to safeguard the essential values of civilization and to facilitate thereby the reestablishment of peace should be strictly observed in such extreme situations.

This mixed bag of policy considerations and moral arguments may not be weighty enough to offset the mass of pragmatic interest-oriented reasons for discarding strict adherence to the laws of war. In government as in other institutions, arguments of principle and of enlightened self-interest have characteristically not fared well. Administrations are more concerned with immediate increments than with considerations involving long-term effects or durable consequences. That is why the prospects for humanitarian principles and a faithful application of the laws of war are slim indeed. What is at stake is the continued existence of our form of civilization. Abandonment by a state of the law protecting innocent civilians from decimation in indiscriminate warfare discredits that state on all human rights issues. It strips it of its clothing of legitimacy and reveals the cold lineaments of the rule of the strong over the weak. Powerful media can ultimately involve even a free nation in complicity in genocide

and in war crimes on a massive scale. Complicity could lead to a rejection of the outside world, to isolationism, to weakness and to ultimate dismantlement from within and from abroad under the twin loads of guilt and of rage. If this country is willing to put up with encroachments of the fundamental rule requiring the protection of civilians in warfare, then I cannot quite conceive that it is seriously committed to any other ideal of justice and of human rights either at home or abroad.

I would like to end these remarks with an appeal to the opponents of the Viet-Nam war. The protracted efforts to terminate U.S. involvement in the war have not borne fruit as yet. In the meantime, hundreds of thousands have died in Viet-Nam. I appeal to the opponents of the war to take time off to support measures for the protection of the civilian population in Indochina. It is both a moral and a legal duty. To tinker with the protection of civilians, to seek to ameliorate their destiny is not to make war more acceptable. Self-righteous pacifism cannot be waged at home at the expense of the women and children of Viet-Nam, Laos and Cambodia.

I would also like to appeal to those who support the President's policy in Indochina to back measures for the protection of civilian populations. Surely, these policies do not preclude attempts dictated by the American tradition, by law and by morality, to protect the innocent noncombatants, the honor of the American Army and the memory of its dead. They must surely realize that no public opinion is going to lend its weight to a national policy indifferent to the fate and the survival of the women and children in Indochina. On the issue of the protection of civilians no fair man can remain neutral. Only the callous or the guilty can remain quiet.

I would like to end with a few words from the greatest living American poet. Robert Lowell wrote:

A principle may kill more than an incident . . . our nation looks up  
to heaven, and puts her armies above the law.  
No stumbling on the downward plunge from Hiroshima.  
Retribution is someone somewhere else and we are young.  
In a century perhaps no one will widen an eye at massacre, and  
only scattered corpses express a last histrionic concern for death.

The CHAIRMAN thanked Professor Gottlieb and then asked the three commentators to limit their remarks to five minutes each so that time could be saved for discussion from the floor. He introduced first Mr. Van Dyke.

### COMMENTS BY JON M. VAN DYKE \*

I had the impression that our two speakers were speaking about very different wars and it is rather hard to get into the subject without alluding briefly, if I might, to some of the remarks that Professor Levie made about what is actually happening in Southeast Asia. He began by quot-

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ing from the International Committee of the Red Cross about how delighted they were with the way South Viet-Nam was treating prisoners of war, and he gave us a typical quotation; that is, what he thought was a typical quotation. I would like to juxtapose that with another typical quotation, if I might use the word, from a report they issued in February, 1970, when they went to the Con Son prison and discovered a group of North Vietnamese prisoners of war who were shackled and tied to their cells, strapped in irons every night from five in the evening until six in the morning, permitted to wash only twice a week, not given enough fresh food or water and only rarely given fresh clothes. The President of the International Committee of the Red Cross, subsequently in August of 1970, criticized the policies of the Saigon Government more directly. "It is profoundly regrettable," he said, "that South Vietnam grants prisoner of war status to only a small part of its detainees and authorizes Red Cross delegates, only with many restrictions, to make visits to a large proportion of its other detainees."

Professor Levie then discussed the situation of U.S. soldiers who did violate the laws of war, and he said that they were tried and punished in due course. That is a vast oversimplification, I believe. Very few of the people that have been involved in what we would call a war crime have been brought to justice. The trial of Lt. James B. Duffy is an example. He was in command of a company in Binhphuoc district in September, 1969, attempting to set up an ambush. The company discovered a man hiding inside a bunker with documents indicating he was a deserter from the South Vietnamese Army. They imprisoned him because they suspected he was a tiger scout for the Viet Cong. Subsequently, according to facts brought to light in a court-martial, and undisputed by the defense, Lt. Duffy told his sergeant, "It is time to get up and get out and shoot him." The sergeant then put an M-16 to the prisoner's head and shot him between the eyes. Lt. Duffy reported to his superiors that the man was shot trying to escape. The court-martial found all these facts to be true and nonetheless sentenced Lt. Duffy, under a verdict of involuntary manslaughter, to only a six-month prison term, and a forfeiture of \$25 per month, and he was allowed to remain in the Army. The sergeant who actually did the shooting was acquitted of all charges. This is not an isolated example. Before Lt. Calley was convicted, 24 other Americans had been convicted for premeditated murder. In every previous case, the sentences were reduced drastically on appeal. The longest was set at 35 years; almost all the others were set at 5 to 10 years. In the draft of Professor Levie's paper that he distributed to us he cited the case of Staff Sergeant Walter Griffen who was charged with premeditated murder of a suspected Viet Cong prisoner in 1967. Griffen admitted shooting the prisoner but argued that he had done so under orders. He was convicted only of unpremeditated murder, sentenced to 10 years in prison, which was reduced to 7 years by the commanding general, then knocked down to two years by the board of review, and he was returned to duty in December of 1968 after having been imprisoned for only 17 months.

As we know, in the My Lai case we have a similar pattern; only one man has been convicted, despite the fact that many were involved. We learned yesterday that Captain Katouc was also acquitted. The conclusion that I draw from this—and this leads me to comment briefly on Professor Gottlieb's very fine proposal—is that we cannot expect the U.S. Army to police itself. Professor Gottlieb very correctly points out that we must bring up to date the rules and regulations that our Army has been obliged to fight under, but that is not enough.

When I was in brief tenure with the Department of State I was involved in investigating violations of the laws of war, and the attitude there was not how do we get our boys to obey the laws of war, but how do we justify or explain, or shift the public attention from, the violations that are occurring. That was under a Democratic Administration; the Republican Administration has taken virtually the same tack. I think that it is asking the impossible to ask a government waging war to police its own ranks. We can see the public outcry that occurs after even the very limited attempt of our Government to punish Lt. Calley for violating the laws of war. The only kind of body that can effectively police violations of the laws of war is an international body.

We have an experience in the Middle East that gives at least some indication of what might be done were there a will to do it. Two recent commissions have been set up to investigate Israeli practices in the occupied territories that Israel acquired after the six-day war in 1967. Both of those international commissions can be criticized to some extent for their lack of objectivity, but they did receive a significant amount of testimony and did issue a report that has had some effect on Israeli policies with regard to human rights in those territories.

The investigation of war crimes in Viet-Nam, I think, should similarly be conducted by a group of experts appointed by a United Nations body, perhaps in co-operation with the International Committee of the Red Cross. This commission should study the conduct and policies of all the parties in Southeast Asia. The international commission need not be given the power to punish, but should be asked to make a thorough investigation to determine which laws of war have been violated, naming names of those responsible for the violations. Ideally the United States and all parties involved in the fighting in Southeast Asia should co-operate with such a commission to the extent of granting the commission the right to subpoena any nationals the commission wants to take testimony from.

Another example of the kind of investigation that would be appropriate is provided by the Bertrand Russell War Crimes Tribunal of 1967. Even though that commission was criticized and largely ignored in this country, it conducted a significant amount of investigation that still holds up under independent scrutiny. It asked the question whether or not our conduct, the kind of conduct that Professor Gottlieb was talking about, did violate existing international law, and found that in many cases it did. This tribunal can be criticized for its lack of objectivity, but it provides a model for the kind of investigation that I think is now mandatory.

Professor Levie criticized the North Vietnamese for calling our prisoners "war criminals" instead of "prisoners of war." The North Vietnamese adopted that stance out of an inability to respond in any other way to the indiscriminate bombing of their country. Had there been some international mechanism to co-ordinate and control the use of military power, it might not have been necessary for the North Vietnamese to adopt that stance. I think we should all urge our Government to move in the direction of helping to organize and co-operate with an independent investigation of war crimes in Southeast Asia.

The CHAIRMAN thanked Mr. Van Dyke for his remarks, and introduced Mr. Sieverts, the second commentator.

### COMMENTS BY FRANK SIEVERTS \*

I wish to comment on the previous three papers in reverse order, taking the liberty of commenting first on some of Mr. Van Dyke's comments before turning to those of Mr. Gottlieb and Mr. Levie.

Mr. Van Dyke referred to the position of the International Committee of the Red Cross with regard to inspections of prisoners of war and civilians in South Viet-Nam, specifically at Con Son, a civilian prison. The inspection at Con Son in February, 1971, to which he referred pertained specifically to twenty-eight prisoners of war prosecuted and convicted for serious criminal acts while held in prisoner-of-war camps, in particular, murder of fellow prisoners and guards. These prisoners were tried and convicted for these offenses and taken to Con Son, a civilian prison, a procedure specifically envisaged by the Geneva Convention. They were retained there under restraint because of their recalcitrant and difficult nature, not in the so-called "tiger cages," I should note. These prisoners have since been moved from Con Son to a military prison, a procedure also authorized by the Geneva Convention.

Having said this, let me comment that this is, of course, an ugly and sordid subject. No one likes to realize that in every prison system in every State in our country and in every country of the world there are facilities to restrain difficult prisoners. A humane spirit of approach to penology would seek to substitute humane practices of detention for the kind of restraints that are in fact practiced. South Viet-Nam is no different from virtually every State in our own country and from virtually every other country in the world, in that there are cases where prisons are operated in such a way that prisoners of this kind are restrained. The difference is that South Viet-Nam is almost the only country in the world which regularly allows international inspection of those civilian prisons as well as, of course, all prisoner-of-war camps.

The statement made by the President of the ICRC in 1970 and cited by Mr. Van Dyke relates to the fact that civilian prisoners do not come under

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the same international legal requirements as do prisoners of war. In South Viet-Nam, the ICRC has conducted a large number of inspections of civilian prisons over the past several years. Those inspections differ in principle from the inspections of POW camps in two respects: The Government of South Viet-Nam requires that advance notice be given for the inspection, and it restricts the ICRC's opportunity to speak privately with individual prisoners. In practice, when ICRC inspections of civil prisons have taken place, those requirements have usually been waived. In other words, the inspectors have shown up without notice, or with very short notice, and in fact have had substantial opportunities to speak privately with prisoners.

However, the Republic of Viet-Nam insists on these restrictions in principle in the case of civilian prisons. It is not a position the United States has supported, I might add. We have made known to them and to the ICRC our view that we would prefer that the Red Cross had the right to inspect civilian prisons without those stated restrictions, in the same way as they inspect POW camps. But I think we have to understand that, again, there is almost no country in the world except South Viet-Nam that allows international inspection of civilian prisons at all, and that in practice they frequently have allowed them without these restrictions. South Viet-Nam's insistence on the restrictions can in some degree be seen as the position of a relatively young country, a hard-pressed, much harassed country, insisting on its national sovereignty with regard to its own civilian prison system.

One other point of Mr. Van Dyke's that I would refer to is the implication that the United States is seeking to cover up and divert attention away from the question of violations of the laws of war by its own military personnel. I find the charge hard to countenance, hard even to comprehend, in view of the fact that every day, for months, years now, our papers have carried and our television screens have been filled with reports of our Government's efforts to prosecute our own military personnel for such violations. I think there is only one precedent in history of a government doing anything like this during a period of armed conflict, and that is in our own country, as we have had drawn to our attention recently, at the turn of the century in the case of the brutal suppression of insurgency in the Philippines.

This is something, I think, that we do have to realize: It is only the United States in which panels of this kind at this meeting take place *during* a conflict in which our country is involved. I think it is a good thing, I think we all do, but it is hardly credible to suggest that the United States Government is guilty in some way of trying to divert attention away from the problem when these prosecutions and courts-martial regularly take place, when the Calley trial is subjected to such a volume of publicity that it produced a public reaction throughout the country that, rightly or wrongly, led the President to take the position he did.

But the *trial* is a fact, and to suggest that some of the sentences of convicted military men were reduced, if I follow Mr. Van Dyke's reasoning,

beyond what might be justified, surely is to mix two rather different concepts or aspects of the law. One is the fact of conviction and the second is the length of sentence. In both civilian and military law there are provisions for reduction of sentences for various reasons, including executive clemency. Surely we would not like to see that kind of procedure condemned in any general way. Obviously there may be individual cases where reduction of sentence is not justified, but I think one has to examine cases in somewhat more detail than Mr. Van Dyke did.

I would like to express appreciation for Professor Gottlieb's very useful and interesting suggestions regarding what the U.S. Government, and, I think by extension he would agree, other governments, might consider doing in this field of seeking a better application of international legal principles to the conduct of war and to the protection of war victims. We do have to distinguish for the purposes of this discussion between the question of waging of war itself, and individual violations of international laws of war. This is hard to do and we all are familiar with the point sometimes made in the preface or opening chapter of books on this subject that war is by nature such a horrible thing that any effort to mitigate its horrors should be ruled out of court in order to reveal its horrors fully to the world so that war itself will stop. There may be some point to this, but it is essentially a wrong principle, I think. We are right as students of this subject to reject it and to express our belief in the possibility of subjecting the conduct of warfare, of military action, of conflict, to some kinds of rules.

I think it is important to realize that other countries are involved here too, and I would say that one of the weaknesses of the procedures that have been established to advance the development of international law is that relatively few governments have been involved in this process. I agree with Professor Levie, who alluded to the fact that newly independent governments go through a sort of rite of passage, in which they run their new flag up the flagpole, seek admission to the United Nations, and sign the Geneva Conventions. I think that many countries, in fact, do not comprehend in any detail what the Geneva Conventions signify. I would not suggest that countries *not* sign the Geneva Conventions; what I am pointing to is how important it is for countries which do not share a Western law tradition to participate fully in the further development and application of the law on the conduct of warfare.

The forthcoming conference of government experts being sponsored by the International Committee of the Red Cross in Geneva in May-June, 1971, will have the full participation of the United States. We know that countries like Sweden, Britain, France, Switzerland, among others, are also going to participate, and we look forward to the participation of a wide range of other governments. We hope they will come. Their presence will be necessary for serious development in the humanitarian rules of war.

We have heard Professor Levie point out the problem that stems from the Communist concept of a just war: the idea that the victim of aggres-



sion is not to be placed on the same plane as the perpetrator of the aggression—a point which has some appeal, perhaps, but one which is obviously foreign to the type of prescriptive law for the conduct of warfare that we are here discussing this morning.

Let me make one final point stemming from Professor Levie's paper on the question of prisoners of war in South Viet-Nam and their readiness to obtain their release by returning to North Viet-Nam, in the case of the North Vietnamese. As I understood Professor Levie, he suggested that this is a problem on both sides. In other words, South Vietnamese prisoners held by the Communist enemy seem to disappear and possibly are inducted into Communist forces, in much the same way as happened in North Korea, and, he suggested, in South Korea, as well as in the case of the Viet Minh after 1954. Let me stress, however, that this is not a situation which goes both ways. In South Viet-Nam, there are close to 9,000 North Vietnamese prisoners of war. The South Vietnamese Government, with our support, is ready to return those men to North Viet-Nam, on a basis of reciprocity. They have repeatedly tabled offers in the Paris meetings and elsewhere, most recently yesterday, for the unilateral repatriation of sick and wounded North Vietnamese prisoners of war, and for the internment in a neutral country of long-held prisoners of war. From our position on these points it is obvious that we go at it with great flexibility.

The problem is that the North Vietnamese place obstacles in the path of those men being repatriated, refuse to agree to orderly procedures, and appear to be instructing the prisoners themselves to refuse repatriation. The suggestion that the South Vietnamese or we are stimulating the prisoners to refuse repatriation is simply not so. North Vietnamese prisoners of war are legally barred from admission to what is called "Chieu Hoi" program in South Viet-Nam, which means "open arms," a procedure by which individual combatants can come in and seek to be restored to citizenship in South Viet-Nam. This procedure is not available to North Vietnamese prisoners of war. Our attitude is that North Vietnamese POW's should be returned to North Viet-Nam. In short, we are faced with the unusual problem of a country that refuses to acknowledge its own personnel in South Viet-Nam and hence does not want to be faced with the embarrassment of a large number of men returning home. The prisoners themselves freely admit their North Vietnamese origin, but for one reason or another, in many cases, do not wish to go home at this time.

The CHAIRMAN then thanked Mr. Sieverts and introduced Mr. Peter Trooboff, the third commentator.

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#### COMMENTS BY PETER D. TROOBOFF \*

When I was about ten years old and had practiced all my swimming strokes for several months in the shallow end of a pool, I was thrown into

\* Attorney, Member of the Bars of the District of Columbia and New York.

the deep end and told to swim. I have the same feeling today as I make my first appearance in a Panel of the Society's Annual Meeting.

I would like to go back to the question of procedures and make my comments on the previous speakers in terms of our attempt to try to define procedures that will help assure compliance with the Conventions concerning the Treatment of Prisoners of War and Civilians. I will comment on the remarks of the main speakers, reserving discussion of what other commentators have said for later.

With respect to Professor Levie's discussion of steps taken by the United States to assure proper treatment of prisoners of war by altering the procedures for their transfer to the South Vietnamese Army ("ARVN"), it seems, as one looks at the regulations on paper and as one reads reports on how these procedures have worked in practice, that there are still problems in this regard which are worthy of study. The directive to which Mr. Levie referred<sup>1</sup> does require that POWs be turned over either at the ARVN POW camps or to interrogation centers. It is not entirely clear, but it appears that under MACV 190-3, the ARVN has responsibility for POWs who are under interrogation at either Combined Military Interrogation Centers ("CMIC") or Corps Interrogation Centers ("CIC"). This ARVN rôle, and the apparent conclusion that not all U.S.-captured POWs are turned over to the ARVN at POW camps, emerges from Paragraph 6(h) of MACV Dir. 190-3, which provides for an ARVN representative to receive U.S.-captured POWs at CMICs and CICs and also provides for the ARVN to turn such POWs over to ARVN POW camps after interrogation.

The allegations of mistreatment of POWs by ARVN forces have not been limited to actions by the ARVN in the field. These allegations have also included statements and supporting evidence concerning mistreatment by the ARVN of POWs during interrogation. If these allegations are correct, then the changes in the U.S. procedures for transferring POWs to the ARVN have not entirely solved the problem of ARVN mistreatment of U.S.-captured POWs.

I realize that representatives from the International Committee of the Red Cross visit the interrogation centers. I recognize that U.S. military personnel are present at some time at some such centers. Nevertheless, the interrogation process is peculiarly susceptible to abuse without adequate procedures for supervising those responsible for the handling of captured personnel during that process. Moreover, interrogation usually requires a short time. In view of these considerations, I think that it is legitimate to ask whether the procedures adopted under MACV Dir. 190-3 should require U.S. military personnel to remain directly responsible for *all* captured POWs until such U.S. personnel deliver these POWs to ARVN POW camps. This would mean that U.S. military personnel would continue to supervise the treatment of captured POWs during the interrogation process in order to assure that zealous interrogators, whether ARVN or other, remain within the requirements for proper treatment of POWs.

<sup>1</sup> United States Military Assistance Command ("MACV") Directive 190-3.

The second issue on which I would like to focus concerns the training of U.S. and other military personnel in the proper treatment of captured POWs under the Geneva Convention. As I listen to speakers in this program and others like it, I become convinced that we have adequate rules on how POWs should be treated. Indeed, a review of the detailed procedures published by the United States military forces in Southeast Asia indicates that the procedures for implementing these rules are usually adequate, with certain exceptions such as the one already mentioned. In my view the real problem is educating U.S. and other military personnel about the rules and procedures in a way which assures that their conduct in the field is consistent with the rules and procedures on paper.

The problem of adequately educating military personnel in the proper treatment of POWs emerges clearly from the published versions of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (March 14, 1970), the so-called "Peers Report" after Lieutenant General W. R. Peers who was in charge of the investigation. You will recall that Lieutenant William Calley was assigned to Company C, 1st Battalion, 20th Infantry and that this Company was commanded by Captain Ernest L. Medina. You will also recall that 1st Battalion was part of the 11th Brigade, which was one of three brigades attached to the Americal Division. In Chapter 4 of the published version of the first volume of the Peers Report, it is stated that part of the 11th Brigade's first day of instruction in South Viet-Nam in December, 1967, concerned the handling of prisoners of war and the provisions of the Geneva Conventions. According to the Report, "[r]ecords of the Americal Division state that 7,700 replacements received instruction in the Geneva Conventions during the period 12 December 1967 to 29 March 1968." The Report adds, however, that in July, 1968, the Inspector General listed the lack of instruction on the Geneva Conventions as a deficiency of the Americal Division.

The account of the actual training of Captain Medina's Company C, 1st Battalion, 20th Infantry, in which Lieutenant Calley served, is equally instructive. Shortly before leaving for South Viet-Nam, Company C, according to the Peers Report, participated in an accelerated training program which was "directed primarily toward the so-called 5 S's—Search, Silence, Segregate, Speed and Safeguard." The Peers Report states that during this training "little emphasis was placed on the treatment of civilians and refugees or the responsibility for reporting war crimes or atrocities." (Chapter 4 at 8.) Moreover, the Peers Report adds that there are "indications that Company C, upon its arrival in South Viet-Nam, received no instruction on the handling and treatment of civilians and refugees" during its participation in the 11th Brigade's in-country "indoctrination training program." That training program was in December, 1967, and early 1968. The Son My massacre occurred in March, 1968.

In my view the issue is not whether there are rules that require training; the issue is whether the training is meaningful and effective. This question is relevant not only to our own troops, but to those also of the

emerging nations who have recently acceded to the conventions. How are we teaching the troops of these countries, and of our own country, what their obligations are? The public outcry over the Calley conviction arose, in part, from a lack of education about what the laws of war require. I ask those of you who are products of the American educational system to recall your high school days and to consider whether in learning about war you also learned about the Geneva Conventions. I suggest that the answer is "no." The same must be said about college-level training. I do not think we can expect nineteen-year-old men to learn about the Geneva Conventions for the first time in their lives at a time when their primary concerns have to do with their personal safety and with their place in the operations of an army.

I would refer back to 1964 when Professor Baxter spoke from this platform at an Annual Meeting of the Society devoted to questions of enforcing international law. At that time he said:

There is reason to suppose that not enough is done to indoctrinate the members of the armed forces of the United States. If states undertook, as they do with respect to international labor conventions, annually to report their compliance with the training requirement of the four conventions, there would be some stimulus to keeping the standards up . . . A yet more daring step could be taken if the parties also allowed the Committee [the ICRC] to examine troops chosen at random on their knowledge of the conventions. To put it briefly, the man who is well schooled in the conventions will find it harder to violate them, even though he is told to do so, than the man who has only a shaky knowledge of their contents.<sup>2</sup>

That was in 1964. If we had done what Professor Baxter recommended, would we be where we are today?

I think we can go even further than Professor Baxter has suggested. The process of educating military personnel about the Geneva Conventions requires more study of learning, as opposed to teaching, what the conventions require. Are we doing enough to insure learning about the conventions by showing a film to tired troops who have been out in the field for the whole day? Are we doing enough by putting before such troops someone who has not given serious thought to the problem of teaching high school dropouts, college graduates, the whole melange comprising American military forces? We should consider a process of re-examination, a process of using all educational techniques, visual, participatory, rôle-playing, etc., to try to convey in this country and in other countries, in the schools and in the military forces, what is required under the Geneva Conventions. That is one suggestion with regard to procedures to promote compliance with the Geneva Conventions.

I have another suggestion with regard to another aspect of the procedures to insure the proper treatment of prisoners of war. A recent radio report announced that the Swedish Government has offered to transport, when and if it is agreed, American troops held as prisoners of war in North Viet-Nam to a neutral country. This sort of offer might be more

<sup>2</sup> 1964 Proceedings, American Society of International Law 86.

valuable if made as a standing offer without regard to a particular conflict or specified prisoners of war. We must give serious thought to establishing such procedures even before conflicts begin in order to reduce the political difficulties inherent in obtaining such offers of humanitarian assistance once a conflict has started. Such procedures might even include methods for exchanging prisoners of war from any conflict. We should, in short, devote more effort to establishing mechanisms that look to future conflicts instead of thinking only in terms of our current difficulties.

The CHAIRMAN thanked Mr. Trooboff and opened the floor to general discussion, with the panelists first given the right of reply.

Mr. VAN DYKE said he wished to comment on points raised by Messrs. Levie and Sieverts in reference to the North Vietnamese assertion that, under their "just war" concept, American pilots are violating international law by taking part in an aggressive war. Although it is argued that the Nuremberg precedents do not support the legal right of the North Vietnamese to try those pilots, Mr. Van Dyke said, his own research while at the State Department revealed that certain Nuremberg precedents are perhaps applicable. In one case a man was charged with destroying a dyke; American bombing of Vietnamese dykes might be considered a comparable act. In the Far East tribunals the United States charged several Japanese with carrying on bombing without a declaration of war; a comparable situation exists with our pilots in Southeast Asia. In the trial of judges who summarily tried and executed American pilots who had flown in the Doolittle raid of 1942, it was implicitly accepted that a fair and just trial of pilots who violated the laws of war by indiscriminate bombing of non-military targets would be appropriate. The Vietnamese could have used a similar rationale.

Mr. VAN DYKE also noted that Mr. Sieverts had asserted that the United States was not in any way encouraging re-education of captured North Vietnamese. Mr. Van Dyke said it was his opinion, based on statements by the President and the Secretary of State, that the United States was in fact encouraging through voluntary indoctrination sessions the idea that the captured North Vietnamese will not all go back to North Viet-Nam.

The CHAIRMAN thanked Mr. Van Dyke and recognized Professor Fred Goldie of the Naval War College and Syracuse University.

Professor GOLDIE said he found it difficult to accept Professor Gottlieb's dichotomy of laws and military orders. Although agreeing that education has been inadequate, Professor Goldie said he felt that procedures have been more thoroughly followed in Viet-Nam than in any other war, and that present rules of engagement are exhaustive on the subject. He also pointed out that the American Army is a cross-section of the American public, who are a violent people. He suggested that a statistical comparison of crime in warfare and in the nation at large would be worth investigating.

Professor GOLDIE also noted that one duty of a commander is to save his own men's lives, and a great deal of fire power has been used to that

end. The standards of minimum use of force in a case where an American policeman subjects himself to danger in order to arrest a citizen he suspects of a crime differs from that in a case where an American soldier subjects himself to hostile fire in order to preserve the life of his opponent. While the former is quite understandable, the latter is a paradox. Professor GOLDIE said that the obligation of a commander to minimize the expenditure of his troops' lives is being lost sight of to a great extent.

The CHAIRMAN gave the floor to Professor Gottlieb.

Professor GOTTLIEB said he had been talking earlier about the contrast in the effectiveness of the transmission of military orders on the one hand, and of orders relating to compliance with the laws of war, on the other hand. He could not understand why this contrast should be permitted. By way of example, all soldiers carry an instruction card "The enemy in your hands—What do you do with him?" Why not add a sentence to this card: "If you carry out any order contrary to these instructions, you may be prosecuted for war crimes."

Professor GOTTLIEB said he regarded the soldier in the field in Viet-Nam today as one of the victims of war. Attention is more properly directed toward the policies adopted at the higher levels of government for the conduct of warfare. We need, he said, minimum rules of engagement and a review board of independent experts chosen by the Administration to examine the directives issued, and the classified as well as unclassified rules of engagement to assure they are compatible in their application with the laws of war and the dictates of humanity. The question is whether the military leadership in its orders and in its fighting practices shows concern not only for body counts but also for the fate of the civilian population. One cannot expect men in the field to show concern for values ignored by the leadership.

Professor GOTTLIEB also said that international commissions acting as review boards were less desirable than a national board because of the political biases which preclude the former from genuine investigative work. The board must be set up within the Administration and must be one which the armed forces respect.

He said that the United States is obligated to see to it that our allies also comply with the laws of war. One way of assuring such compliance is to write tying clauses into our military, foreign aid and international assistance bills.

Finally, Professor GOTTLIEB said that, if there is no spirit of humanity and compassion behind the Administration's policies, we cannot expect compliance with the Geneva Conventions. There was, he said, not one line in the President's Report on the State of the World about what has happened to the people of Indochina.

The CHAIRMAN thanked Professor Gottlieb and gave the floor to Mr. Benjamin B. Ferencz, whom he introduced as a man of long and deep experience in the investigation of war crimes in the World War II period and as a prosecutor in the Nuremberg Trials.

Mr. FERENCZ said that twenty-five years ago he had felt he was helping

establish fundamental rules for humanitarian behavior which showed respect for law and which were based on the type of compassion to which Professor Gottlieb had referred. The problems of defining behavioral standards, of transmitting these standards to troops, and of enforcing those standards in practice, however, had unfortunately still not been solved.

Mr. FERENCZ said he hoped the United States would support efforts through the International Committee of the Red Cross to extend present behavioral standards to cover such modern problems as the use of napalm, free fire zones and other new methods of warfare. Even the definition of standards, he said, was not as difficult a problem as their effective transmission to the troops, which people had been trying to improve for years. The most difficult problem, however, was the establishment of enforcement machinery, and the solution to that lay in creation of an objective international tribunal which could determine issues such as whether an act constituted aggression, and hence whether a crime was committed or not. A national review board such as Professor Gottlieb suggested, he said, would amount to the Government judging itself, making objectivity difficult and generating the same kinds of internal pressures which arose from the Calley trial.

Mr. TROBOFF asked Mr. Van Dyke how the North Vietnamese could legally justify applying the Nuremberg principles to a class of persons, namely, all captured U.S. military personnel. Some of the captured personnel held by North Viet-Nam are clearly not war criminals and committed no acts which would even arguably be regarded as war crimes. The Nuremberg principles apply to individuals, not to persons as a class, if they apply at all in the Indochina war.

Second, Mr. TROBOFF wanted to know how the North Vietnamese could legally justify their position that merely raising a colorable argument that a captured soldier has committed a war crime constitutes grounds for denying that soldier treatment as a prisoner of war. Under the language of the North Vietnamese reservation to Article 85 of the Geneva Convention on POW's, North Viet-Nam has stated that it will deny prisoner of war status to persons "prosecuted and convicted" of war crimes. The North Vietnamese position is wholly inconsistent with the express language of its Article 85 reservation.

Finally, with respect to the training of United States military personnel, Mr. TROBOFF asked if such personnel are made as fully aware of the rules of engagement and the proper treatment of civilians and prisoners of war as they are of how to defend themselves, how to dig a foxhole and how to inflict harm to the enemy.

Mr. WILLIAM L. GRIFFIN said he felt that the substantive law regarding the treatment of prisoners of war was reasonably well developed, but the lack of procedures for the vindication of substantive rights is the real deficiency in this area. He illustrated this point by describing the plight of Yugoslav prisoners of war of Germany who refused to return home after World War II, thereby becoming stateless refugees and later nationals of other countries. Under the customary law of diplomatic protection no

government has standing to espouse their right to be paid the wages still owed to them for their compulsory labor while prisoners. The government of an ex-prisoner's new nationality, or any government in the case of stateless ex-prisoners, should have standing in international law to espouse their claims arising under the law of war or the Geneva Conventions. An alternative procedural reform, Mr. GRIFFIN said, could be to provide an international tribunal before which such persons could become plaintiffs in their own right, without the interposition of any government.

Professor LEVIE denied that he had said that our prisoners of war could not, in the appropriate place, be tried for war crimes. On the contrary, he said, Sgt. Griffin, for example, was tried by our own courts although, because it was a U.S. court, the charge was murder rather than a war crime. His point, Professor LEVIE said, was that, quite without regard to the compliance with the laws of war by these individuals, it is contended that they are all war criminals simply because they are fighting against North Viet-Nam.

Furthermore, Professor LEVIE added, individual riflemen who complied with the laws of war could not be tried for making aggressive warfare; only the high-ranking makers, planners and preparers could be tried for that. This interpretation of the Nuremberg principles was confirmed, he said, by the opinion of the International Law Commission in adopting those principles.

Finally, Professor LEVIE said that he agreed wholeheartedly that there should be third-party supervision of compliance with the laws of war, including treatment of prisoners of war and civilians.

Professor CARL CHRISTOL said that it is the function of the U. S. Government to ensure that U. S. prisoners of war be treated humanely and that he wished to make it clear that he supports the President's position that there should be an early return of American prisoners of war held by the North Vietnamese. The presence of U. S. military forces in South Viet-Nam certainly is related to the negotiation for their early return.

Mr. MARC SCHREIBER, Director of the Division of Human Rights, United Nations Secretariat, remarked that, although it had not always been the case, the United Nations was now actively involved in dealing with problems arising relating to the protection of human rights in time of armed conflicts. He cited as examples the treatment of prisoners of war and of civilians, including most recently the treatment of correspondents and journalists in war zones, and problems with respect to indiscriminate use of force. He referred to the Secretary General's recent evaluative studies of the substance and applicability of the Geneva Conventions for their possible improvement, and to the two very significant reports, mentioned earlier by other speakers, identifying the nature of certain problems. He drew particular attention to the second report containing a number of far-reaching proposals on specific subjects, such as treatment of civilian populations, creation of refugee zones for those civilians who deserve to be there or who might be there without endangering anyone, and treatment of prisoners of war between the time of their capture and the time of their internment. He also referred to the question of additional international



machinery to assist in the implementation of international agreements in the humanitarian field. The United Nations Secretariat needs responses from nations on these proposals in order to effect any progress in solving these most serious problems. He urged not only governments but also members of the academic community to study the Secretary General's reports and to express their views as to the proposals therein.

Professor RICHARD A. FALK commended Professor Gottlieb's very constructive suggestions, and added that he felt it is a distortion of the issue to consider war crimes solely in relation to the protection of American prisoners or in terms of ground action. The more fundamental issue of war crimes results from massive and indiscriminate reliance upon long-range artillery and air power. These criminal policies are shaped, and have been throughout the war, at the highest levels of civilian and military command. The real criminals, therefore, are the rulers of the country. As further evidence of official criminal policies he referred to the case of Lt. Duffy cited earlier by Mr. Van Dyke. The undisputed defense testimony offered at the trial asserted that American soldiers believed the killing of prisoners to be consistent with the "body count" philosophy, and that official pressure to turn in maximum body count totals induced American soldiers to treat *every* dead Vietnamese as a Viet Cong.

Public reaction against the Calley conviction, as indicated by polls, Professor FALK said, shows that a majority of the American public do regard what Calley did as a crime but do not consider it as an isolated incident. Rather, My Lai is considered typical of the war itself, of what field soldiers were expected to accomplish, and representative of a common occurrence in the war. In view of such perceptions, the American public views Calley as a scapegoat for widely endorsed policies.

In conclusion, Professor FALK stressed that we cannot begin to confront the crisis that these issues pose for American society until we are prepared to face the issues in terms of official responsibility at the highest level for criminal policies, and to realize that the war is a continuing criminal enterprise.

Mr. BENJAMIN FORMAN, Assistant General Counsel of the Department of Defense, pointed out, in reference to the question of training and indoctrinating troops, that, since the present United States program is apparently not good enough, steps were being taken to improve it. Furthermore, he stressed, the present program is nothing to be ashamed of as it is probably the best program of training and indoctrination on the Geneva Conventions of any country in the world.

Referring to the request from the International Committee of the Red Cross that signatories furnish information on their training programs in accordance with the provisions of the conventions, Mr. FORMAN noted that there were few responses at the International Red Cross Conference in 1969, and that those who did respond seemed to be giving instructions of a very limited nature. The response from the United States was, in contrast to the others, quite lengthy. (See ICRC Document D.S.3/1 b, April, 1969.)

Replying to Mr. Trooboff's question concerning the effectiveness of training in this country, Mr. FORMAN admitted that it obviously does not reach everyone to the same degree, and that measuring its success is difficult except by observing the results in combat. He disagreed with Mr. Trooboff's endorsement of Professor Baxter's suggestion that the International Committee of the Red Cross examine the troops on their knowledge of the Geneva Conventions; he reminded those present who were members of the Bar that it is not unheard of for a law graduate to fail the Bar exam.

Professor GOTTLIEB elaborated on his suggestion for a military practices review board. The idea behind it, he emphasized, is that distinguished members of the profession could communicate in private with their counterparts in the Government who, as George Ball stated at an earlier session, do not believe very much in institutions and procedures or legal restraints, but who operate rather on an *ad hoc* basis as the rush of events comes flowing over them. Public denunciation and confrontation, Professor GOTTLIEB argued, are not the way to get results; there must be more private, ongoing advice on how Government policies are and are not compatible with international law and the requirements of humanity. This is very different from the penal approach to the enforcement of the laws of war in which the Government acts as prosecutor, judge and jury.

Referring to the contribution of the United Nations in the study of these problems, Professor GOTTLIEB said that the report on "Human Rights in Armed Conflicts" was truly excellent and most significant. In response to Mr. Schreiber's request for reactions to the U.N. proposals, Professor GOTTLIEB warned that the concept of zones of refuge could easily be abused as an excuse for the forced resettlement of civilian populations rather than for their protection as the report intended. Commenting further on the report, Professor GOTTLIEB expressed his surprise that the Secretary General had done so little to safeguard the human rights of the victims of the armed conflict in East Pakistan. Even without big-Power support, the Secretary General could at least have offered to go to Dacca to assess the humanitarian needs of the population. Refusal by the Pakistanis to admit the Secretary General on a humanitarian mission would have been significant. Vigorous action by U Thant would have been encouraging in this dark period.

In concluding, Professor GOTTLIEB remarked that it seemed evident that many of those who spoke felt only selective concerns, concern for only certain groups. Until that concern is made universal and covers all victims of war, whether Vietnamese, American, black African, Arab, Bengalis, or any other, neither the United Nations nor the Red Cross nor the United States Government would have real credibility in humanitarian matters.

Chairman CAREY next recognized Captain Jordan Paust, U.S. Army Instructor in the International and Comparative Law Division of the U.S. Judge Advocate General's School in Charlottesville, Virginia.

Captain PAUST agreed with Professor Gottlieb that a revolution of cooperative concern is essential to the solution of these problems, and stated that there can be no political excuse for a denial of well-defined commu-

nity norms and expectations. In his opinion, there are enough laws; what is needed is their co-operative implementation at "working" levels. He supported the view that international investigative machinery would make a positive contribution, particularly by marshaling world public opinion. He further urged that a preventive rather than a punitive approach be taken in the application of legal solutions to these problems.

Miss CARYN GOLDENBERG expressed her full endorsement of Professor Falk's comments. She asked, on behalf of students who shared her concern, what they and other individuals might contribute toward preventing atrocities like My Lai and toward ensuring more humane treatment of prisoners of war in Southeast Asia. If students and individuals are unable to affect even our own Government, she asked, how can one expect to change the attitude of the Government of North Viet-Nam?

Mr. MAXWELL MCKNIGHT shared many of Professor Gottlieb's concerns, but was particularly troubled by the problems of enforcing standards for humane treatment of prisoners of war. He asked Mr. Sieverts whether American or world public opinion was having any effect on Hanoi's treatment of those prisoners.

Mr. SIEVERTS replied that we have no way of knowing whether such expressions of public opinion influence North Viet-Nam's treatment of their prisoners. He stressed that in any case the United States is not relying on the pressure of public opinion to solve the problem, but rather is carrying on extensive diplomatic initiatives in search of a solution. The problems go even beyond the fate of these men and their families, however, for there will be prisoners in other conflicts for many years to come throughout the world, and applicability of the Geneva Conventions must be ensured to protect them as well.

In reply to Miss Goldenberg's concern, Mr. SIEVERTS noted that, although almost everyone recognizes that the war must end soon, there remain differences of opinion on how to accomplish that goal. He reminded the audience that the President is withdrawing troops as rapidly as possible while allowing South Viet-Nam a chance at self-defense, and at the same time allowing the United States a chance to obtain the safe return of our prisoners of war. The question, he said, is whether North Viet-Nam is willing to forgo its aim of taking over the South. It is time for the North Vietnamese also to accept a compromise solution.

In response to Professor Falk's assertions of "indisputable" evidence of war crimes in the Viet-Nam conflict, Mr. SIEVERTS questioned whether Professor Falk defined as war crimes the military actions themselves, or rather the cause they serve. Citing examples from World War II and other conflicts of U.S. and Allied policies that in the Viet-Nam context Professor Falk had termed criminal, Mr. SIEVERTS asked whether Mr. Falk's arguments extended to those earlier policies and therefore to the rulers in charge at the time. He cautioned, however, that a panel of this nature, confined as it was to a specific aspect of the problems in armed conflict, was not the place to solve that sort of question.

Dr. HOWARD A. I. SUGG stated that, from his point of view, of all alternatives facing the United States, the one least harmful to the national

interests of the United States is immediate and complete withdrawal from Viet-Nam. He further commented that a major reason for our difficulties in the development and effective application of humane rules of warfare is our lack of a comprehensive and effective strategy and tactics for the conduct of irregular or unconventional wars, such as that in Viet-Nam.

Colonel WALDEMAR A. SOLF, Department of the Army, International Affairs Division, J.A.G., noted briefly that the specific emphasis of four new mandatory Army training films is the soldier's obligation not to obey a criminal order. He went on to comment on the question of resettlement of civilians out of free fire zones which, he said, is part of the implementation of the principles of General Assembly Resolution 2444 (XXIII). The resolution states that civilians as such must never be made the objective of a direct attack and that belligerents should always maintain a distinction between civilians and combatants. It is the tactic of the other side to blur that distinction, he said, and as a result many civilian casualties are caused.

Chairman CAREY then asked each of the speakers to make final statements of no longer than two minutes each.

Mr. TROBOFF reiterated his emphasis on the distinction between training and learning, and questioned how much learning took place in most U.S. military training programs on the treatment of civilians and prisoners of war. In response to Mr. Forman's reference to the fact that some law graduates fail Bar exams, Mr. TROBOFF asserted that until one passes the Bar exam, he does not practice law. The same principle, he concluded, should be applied to troops with regard to the laws of war and the treatment of civilians and prisoners of war.

Mr. VAN DYKE pointed out that the North Vietnamese no longer refer to our pilots as war criminals, but use instead the neutral term "captives" or "detainees." In addition, they have retreated from their initial charge that every pilot is a war criminal. With regard to Article 85 and the North Vietnamese reservation to it, mentioned earlier, he referred the group to the January, 1967, issue of the *Harvard Law Review*.

Professor GOTTLIEB stressed that the deliberate abandonment by the other side of the distinction between combatants and noncombatants may explain the policies we have adopted, but it is certainly not a satisfactory justification for them. To offer this as justification, he said, is to allow the enemy to force us to abandon that distinction. It would allow the enemy to determine the character of our armed forces. Then, he said, they will have won, for we will have become like them.

Professor GOTTLIEB concluded with emphasis on four points: (1) Most important in the Viet-Nam war is authoritative guidance on the compatibility of policies and practices adopted in the war with the requirements of humanity and the rules of warfare. (2) Until orders governing the laws of war become part of the fabric of military orders, and until the transmission of both is equally effective, compliance by the man in the field remains unlikely. (3) A spirit of compassion and concern for the destiny of civilian populations must be brought back into the operation of our military forces and the formulation of our foreign policies. (4)

While international efforts to secure the protection of human rights must be encouraged, these must not become an excuse to delay putting our own house in order.

Professor GOLDIE commented that one should not insist that one country's soldiers should walk about in the open, if its opponent is determined to wage concealed warfare.

Professor LEVIE stated that third-party supervision provides one solution to the problem of supervisory procedures in handling prisoners of war and civilians in armed conflict. The presence of outsiders, he said, would ensure the correction of mistakes and encourage compliance with the laws of warfare.

Chairman CAREY then closed the meeting by summarizing the discussion. He said that he had been fearful that the problems before the Panel were so vexatious that the discussion might be an exercise in futility, but that had not been the case. The speakers had been imaginative and realistic, and had presented novel suggestions which were worthy of great consideration and exploration.

He commended Professor Gottlieb's proposal for a unilateral revision of directives guiding U.S. military personnel without waiting for any kind of international bargaining process, and urged the military establishment to give it due consideration. He noted that there had been suggestions for international supervision, both investigatory and preventive, and that from all speakers there had been discussion of the training which is necessary to ensure that rules of war are respected under the stress of combat. We applaud, he said, all efforts which are being undertaken to revise, improve and update United States military training concerning the treatment of prisoners of war and civilians in combat areas.

The CHAIRMAN then thanked the speakers, commentators and members of the audience for their participation in the discussion, and adjourned the meeting.

### **The Teaching of International Aspects of Human Rights**

(Discussion Group sponsored jointly with the United States Institute of Human Rights)

The group met at 9:15 a.m. in the Pan American Room of the Statler-Hilton Hotel, Professor Louis Henkin of Columbia University School of Law presiding.

Professor HENKIN welcomed the audience in behalf of the United States Institute of Human Rights and the American Society of International Law. He referred those not acquainted with the Institute, its purposes and activities, to the recent note in the *American Journal of International Law*.<sup>1</sup>

The panel would discuss from different perspectives how, when and

<sup>1</sup> 64 A.J.I.L. 924 (1970).

where to teach human rights. Perhaps one should begin by re-examining the implicit assumption and ask also whether and why human rights should be taught. Our answer, briefly, is that human rights now have a recognized and accepted place in international law; that human rights have achieved an autonomous existence and importance warranting, if not requiring, that they also be taught separately, not merely as a small segment of a general course in international law; that human rights have a distinct character deserving distinct and special teaching.

Human rights law, all know, is new international law. For students of international law it provides a prime example of the redistribution of authority between the national and international domains in our times: some matters which were once the largely accepted concern of international law have for many states reverted to domestic jurisdiction (for example, property rights of aliens, which some might indeed deem to be human rights); while the rights of all persons, nationals as well as aliens, have fought their way into international consciousness, conscience and concern against rooted, resisting claims of domestic jurisdiction. Unlike other international law, international concern with human rights is rooted in humanitarian considerations, not in traditional national interest. Some violations of human rights, *e.g.*, racial discrimination, have stirred powerful political forces in contemporary international society related to self-determination and the end of Western colonialism in Asia and Africa. Other human rights issues are involved in the ideological conflict between Communism and the West. The forms of international human rights law, moreover, are exceptional, for while much human rights law is contained in treaties, many nations are reluctant to adhere to them, yet U.N. declarations and resolutions on human rights have achieved an extraordinary quality as law and effectively shape national behavior. The means for inducing compliance with human rights law are also exceptional: there is usually no particular foreign interest to enforce human rights law, but there is a special international constituency; human rights law, then, relies less on "horizontal" enforcement by states aggrieved by a violation, more on special mechanisms, national reporting, international commissions and courts, non-governmental organizations and media to scrutinize, expose, deter, help undo violations.

As regards human rights, also, there is a special relation between national and international law with important implications for teaching. In substantial measure the international law of human rights parallels and supplements national constitutional law and national bills of rights, and international concern for human rights supplements strong national concerns and national forces defending the rights of individuals. In some respects, however, the national and international concerns with human rights diverge, even conflict, for some violations of human rights reflect not aberrant behavior but major national policy, *e.g.*, *apartheid*, Nazi genocide of Jews, organized repression of dissidents. The United States Institute of Human Rights has stressed the implications of these and other

relations between national and international human rights law for teaching and research, urging, for example, co-ordination of study of international law and human rights with Constitutional and civil rights law.

Mr. HENKIN introduced the members of the panel, calling first on Professor EGON SCHWELB, "Mr. Human Rights."

## THE TEACHING OF THE INTERNATIONAL ASPECTS OF HUMAN RIGHTS

*By Egon Schwelb \**

At the outset, I wish to express my appreciation which, I am sure, is shared by many in this room, for the initiative taken by the joint sponsors of this meeting, the United States Institute of Human Rights and our American Society of International Law, to place the question of the teaching of the international aspects of human rights on the agenda of the annual meeting of the Society. This fact is of considerable importance. Its importance is not only symbolic. It amounts to the official recognition by this great Society, the leading scholarly association devoted to international law, of the fact that the international protection of human rights is now an essential and indispensable part of the discipline of international law.

The comments which I am now going to make are confined to the teaching of the law of human rights in law schools or faculties of law as part of the teaching of public international law or of the law of international organizations. I do not propose to concentrate today on the equally important aspects of our subject, the teaching of the international law of human rights as an element in the teaching of municipal law, particularly constitutional and administrative law and also of private law. This does not mean that I propose a complete separation of these two aspects. Such a separation is neither possible nor desirable. In many jurisdictions the international law of human rights is part of the law of the land. The best known, but by no means the only instance of this phenomenon is, of course, the domestic status of the European Convention of Human Rights in some of the states parties to it. In any event, the reflection of the international law of human rights in municipal jurisdictions is of necessity an essential element in the study of the international law in this field, which study, if it serves any purpose, must include the study of the effectiveness, or otherwise, of the international norms in the domestic legal systems of states. The very question of the application of the international provisions in internal law either automatically or by way of statutory transformation, is an essential concern of the international lawyer working in this field.

I am now going to submit a kind of nucleus of a curriculum for the teaching of the law giving effect to the international concern with human

\* Yale Law School.

rights in law schools or law faculties. The starting point for the curriculum thus outlined is the international law on the subject. The international concern with human rights, particularly with religious liberty and with the combating of the slave trade and of slavery, goes back to the seventeenth, eighteenth, and early nineteenth centuries; the first decades of our century have seen international activities in the fields of labor legislation, the protection of racial, religious, and linguistic minorities, and of the populations of dependent territories. It was, however, only as a consequence of the fateful events connected with the second World War that the quest for comprehensive international action directed towards the promotion of respect for human rights everywhere had its origin.

The principal source of the contemporary international law of human rights is the human rights provisions of the United Nations Charter. The question whether and to what extent the Charter imposes legal obligations on Member States in the matter of human rights is controversial among governments as it is among writers. Without wishing to enter into this controversy, it is, I think, possible to assert that in practice the overwhelming majority of governments, a majority bordering on unanimity, has acted on the proposition that Member States do have obligations in this sphere.

If one starts from this proposition, the activities of the United Nations in the matter of human rights fall logically and almost automatically into three vast categories:

*One:* The action taken, or attempted to be taken, by United Nations organs on the basis of the authority vested in them under the Charter, expressly or by implication, the attempts to make use of the great potentialities which the Charter offers.

*Two:* The efforts, in part successful, in part not yet so, to persuade states to accept additional legal obligations through the conclusion of additional treaties in the human rights field—additional, that is, to the basic treaty, the Charter—and through the establishment by these treaties of additional international machinery, additional international organs, to those established by and under the Charter.

*Three:* There is, between these two main categories, a twilight zone of acts, facts and situations which come, in part, within the scope of the former category (measures taken on the basis of the Charter, without the intervention of an additional treaty) and, in part, within the scope of the latter, the creation of new instruments setting international standards in human rights.

Although these logical categories were not as clearly visible twenty-four or twenty-five years ago, when the first tentative steps were taken to fulfill the promise contained in the human rights provisions of the Charter, as, with the benefit of hindsight, they are today, they can be traced back to the earliest United Nations pronouncements on the matter.

The first category, *i.e.*, the interpretation and application of the Charter and the action which has been taken and which is being taken on the basis



of the Charter, is of equal importance with the other two categories. In this context the teacher of international law has to deal, among other things, with the attitude of the various United Nations organs in regard to complaints by states as well as by individuals about violations of human rights. The course, as I conceive it, has to cover the well-known self-denying ordinance of the Commission on Human Rights of 1947 stating that it has no power to take any action in regard to complaints concerning human rights, and the repeated attempts undertaken over many years to have it reversed—attempts which, in the recent past, had some modicum of success, when the Economic and Social Council provided for the possibility, albeit very narrowly circumscribed, of the investigation of situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights. The course on the international law of human rights has to cover such items as the action undertaken by the Economic and Social Council in co-operation with the International Labor Organization in such fields as forced labor and freedom of association for trade union purposes. The proceedings of the General Assembly, and on certain occasions also of the Security Council and other United Nations organs in matters of racial discrimination in the southern part of Africa, also belong within this category. The investigations of the alleged violation of human rights in the Israeli-occupied territories also invoke as their constitutional basis the provisions of the Charter.

Under the heading of action taken on the basis of the Charter, the so-called program of practical action also has to be studied. This program was adopted in the mid-fifties on the initiative of the Eisenhower-Dulles Administration. It involves the undertaking of world-wide studies by the Commission on Human Rights of particular rights or groups of rights, the system of periodic reports on developments in the human rights field, and what are called advisory services in human rights, *i.e.*, the arranging of conferences called seminars, the making available of the services of experts and the granting of fellowships and scholarships. All these branches of the program of practical action have now been in effect for some fifteen years. The proposal for the establishment of the Office of a United Nations High Commissioner for Human Rights, which has been before the General Assembly for several years, without action having been taken, would, if it should be accepted, also come within the category of action taken directly on the authority of the Charter.

As far as the second category of United Nations efforts is concerned, namely, the preparation and putting into effect of international conventions by which states accept obligations in the human rights field additional to those which arise for them out of the Charter, it needs no emphasis that this comprehensive body of law is the natural concern of the international lawyer and therefore both of the teacher and the student of international law. Some of these instruments, the International Covenants on Human Rights which were opened for signature and ratification in December, 1966, are not yet in effect. This is, of course, no reason why they, their legislative history and their implications should not be studied

at this stage. Moreover, a large body of international conventional law established by the United Nations family of organizations is in force, has been in force for a considerable time and among a fairly large number of states. It ranges from the Genocide Convention of 1948, instruments dealing with slavery and forced labor, political rights of women, nationality of married women, free consent to marriage, freedom of association, status of refugees, status of stateless persons, to the three great instruments combating discrimination: discrimination in employment and occupation, discrimination in education and, last but not least, the Convention on the Elimination of All Forms of Racial Discrimination. The principal organ of implementation under this convention started its operations in 1970 and held its third session this month (April, 1971).

In recent years, the General Assembly has also addressed itself to the question of the protection of human rights in armed conflicts, *i.e.*, the application of the Hague and Geneva instruments of 1899, 1907, 1925 and 1949 and the desirability of preparing supplements thereto.

The third category which I listed, the twilight zone between the first two categories, requires study and research to no lesser extent. I have in mind particularly some of the solemn declarations of the General Assembly of the United Nations, beginning with the Universal Declaration of Human Rights of 1948, the impact and relevance of which are a principal concern for everybody who wants to enter into serious investigation of the over-all subject. This part of the teacher's task has to do with the sources of international law and the problem of the quasi-legislative activities of international governmental organizations.

Regional developments in the human rights field, particularly those within the Council of Europe and within the Organization of American States, deserve great attention. The European Convention on Human Rights and the case law of the organs which it has established, the European Commission of Human Rights and the European Court of Human Rights, have been the object of an extraordinarily large amount of scholarly literature and have been explored in all their ramifications. The establishment, more than a decade ago, of the Inter-American Commission on Human Rights, and the signature in 1969 of the American Convention on Human Rights have added a wide field into which investigation and research are required and which will have to be reflected in the teaching.

The existence side by side of global and regional instruments containing substantive provisions which are not always fully identical and which establish competing international organs and procedures creates one of the difficult problems of the contemporary scene. The problem arises, or will arise, also between various instruments emanating from organizations of the United Nations system.

The regional developments have attracted, and will continue to attract, the attention and efforts of scholars. This is all to the good, of course. However, I feel that I should add that the very interesting and, in part, very successful regional activities should not prevent the profession and the teacher from paying appropriate attention to the global endeavors in

our field. Scholars and practitioners involved in the great European experiment are rightly proud of what has been achieved. We should not lose sight, however, of the fact that the global endeavors, while not at this stage equally conspicuous, neat and pleasing to the legal mind, cover a far larger part of the world. By way of illustration: the International Convention on the Elimination of All Forms of Racial Discrimination, the exploration of which has hardly begun, is now binding on 48 states, *i.e.*, more than three times the number of parties to the European Convention on Human Rights. And there are, of course, at present 127 parties to the Charter.

Let me conclude with a quotation from a great teacher of international law and, until his recent lamented death, one of the outstanding members of this Society, Josef L. Kunz. He said in 1949: "In the field of human rights as in other actual problems of international law, it is necessary to avoid the Scylla of a pessimistic cynicism and the Charybdis of mere wishful thinking and superficial optimism." It is, I believe, one of the tasks of institutions of higher learning and, in our field, in particular, of law schools, to contribute to the collection, clarification, presentation and analysis of the facts and developments which alone can bring about the avoidance of either of these extreme attitudes.

## A CASEBOOK ON THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

*By Thomas Buergenthal \**

A law teacher's approach to his course is often reflected in the teaching materials he uses. It seems appropriate therefore that I speak about the casebook on the international protection of human rights on which Professor Louis B. Sohn and I have been working for the past few years.

This project has taken longer than both of us had initially anticipated. The delay can be ascribed, in part, to the fact that there did not exist another human rights casebook from whose mistakes we could have profited or on whose wisdom and pedagogical skill we could have drawn. This lack of a model has forced us to engage in a great deal more time-consuming experimentation with the organization of the book than we might otherwise have felt compelled to undertake.

The subject matter itself—international protection of human rights—poses a special problem for the casebook editor; it provides added proof for the axiom that the less settled a given area of law is, the greater is the volume of supposedly authoritative and quasi-authoritative pronouncements bearing on it. In the international human rights field, particularly on the universal as distinguished from the regional level, one has to contend with volumes of debates, resolutions, declarations and conventions, all to some extent instructive and relevant, but only if seen as comple-

\* State University of New York at Buffalo School of Law.

mentary elements of a single lawmaking or institution-building process. Thus, although it is easy to put together a concise set of materials on the European Convention, it is extremely difficult and probably pedagogically unwise to do the same for the human rights law of the United Nations. Here one has to embark upon a painstaking pruning process to avoid either smothering the student in mountains of documents or presenting him with a distorted and superficial overview that tells him nothing about the evolving rôle of the human rights law of the Charter.

The function to be performed by the casebook presents difficult choices. In established fields of law, where the source material is readily available and where those teaching the subject have at least a working familiarity with the relevant cases and statutes, the editor can in large measure let his pedagogical predilections determine the contents and organization of his book. The editor of the first international human rights casebook is not in this enviable position. He cannot be unmindful of the fact that basic source materials are not readily accessible and that few international lawyers have a thorough overview of the subject matter. We concluded, consequently, that we had an obligation to publish more than a mere teaching tool for a one-semester course. A teaching tool—a casebook—was clearly needed, but so is a source book for human rights materials on which the law teacher can draw to educate himself and to experiment with a variety of different types of seminars and courses. We decided, therefore, to put together a casebook capable of serving as a source book to a substantially greater extent than is the traditional American casebook.

This means that we seek to provide a reasonably comprehensive collection of the basic materials and documents—historical and contemporary—bearing on the field as a whole, supplemented by editorial and bibliographical notes. As a practical matter, the book should therefore give the instructor considerable latitude in designing the type of human rights course he would like to teach. It is our hope that the materials will lend themselves for effective use in a general survey course, in courses devoted to the human rights law of the U.N. Charter and/or the European Convention, in seminars dealing with the Inter-American Human Rights system or with the racial policies in Southern Africa. Given its contents, the book could easily serve as the basic text for a problem-method course or as a supplemental research tool for scholars lacking ready access to adequate library facilities.

This flexibility cannot, of course, be achieved without to some extent diminishing the pedagogical symmetry of the work, if only because one is compelled to include certain documents here or there which would have been omitted or more extensively edited were one guided primarily by considerations of classroom effectiveness. To us this did not seem to be too high a price to pay, given the need for source materials and the opportunity for experimentation that their availability will provide.

Turning now to the materials that will be reproduced in our casebook, I should note that with minor exceptions we are using primary rather than secondary sources. Here our model has been Louis Sohn's *Cases on United*

*Nations Law.* We rely almost exclusively on judicial and arbitral decisions, on reports, debates, resolutions and declarations of international organizations, and on diplomatic correspondence and state practice. Whenever possible, moreover, we strive to present these documents in a form that is best calculated to enable the student to gain an insight into the process by which the relevant legal principles and institutions have developed. Thus, in dealing with state responsibility for injuries to aliens, to cite but one example, we prefer diplomatic correspondence to the traditional case law, since the former usually conveys a much truer picture of the competing policy considerations that influenced the development of certain legal principles than do the judgments of the arbitral tribunals.

The mimeographed outline being distributed to you should give you a rough idea of the contents of our book. To save time, I won't discuss it now, although I would be glad to answer any questions you might have. I am pleased to note, however, that Dr. Schwelb's description of the subject-matter contents of an ideal course on the international protection of human rights does not differ to any substantial degree from what Louis Sohn and I are attempting to come up with.

## APPENDIX

### *Tentative Outline*

#### INTERNATIONAL PROTECTION OF HUMAN RIGHTS: CASES AND MATERIALS

*Edited by Louis B. Sohn and Thomas Buergenthal*

#### PART I: THE INDIVIDUAL AND INTERNATIONAL LAW: AN HISTORICAL SURVEY

##### *Chapter 1: Denial of Justice and the Rights of Aliens*

- A. Private and Public Reprisals.
- B. Responsibility of States for Injuries to Aliens.

(*Note:* This chapter traces the development of some basic state responsibility principles. Included are 14th-17th-century English letters of marque and reprisal, some classic state responsibility cases and diplomatic correspondence.)

##### *Chapter 2: Humanitarian Intervention*

- A. Intervention on Behalf of Minorities.
- B. Diplomatic Intercession on Behalf of Minorities.

(*Note:* This chapter deals with the doctrine of humanitarian intervention and its abuses. The "cases" consist of diplomatic correspondence and treaties bearing on the practice of the Concert of Europe.)

##### *Chapter 3: The League of Nations and Human Rights*

- A. The Minorities System.
- B. The Mandate System.

## PART II: UNITED NATIONS SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

(*Note:* Although conceptually the U.N. human rights system can be deemed to include the activities of its specialized agencies, we have decided to concentrate on the U.N. proper. Textual notes in Parts II and III familiarize the student with the work of the ILO and UNESCO.)

### *Chapter 4: The Charter and Human Rights*

- A. Legal and Institutional Setting.
- B. Human Rights and Domestic Jurisdiction.
- C. Role of the Universal Declaration of Human Rights.

(*Note:* This chapter traces the constitutional evolution of the human rights provisions of the Charter. The materials consist of "cases" debated by the General Assembly or Security Council. Examples: Racial Situation in South Africa, Russian Wives, etc.)

### *Chapter 5: Implementation of Human Rights*

- A. Emerging Institutions and Techniques.
- B. Codification Efforts.

(*Note:* This chapter focuses on the attempts to empower the U.N. Human Rights Commission to act on complaints; it considers the proposal for a U.N. High Commissioner for Human Rights and other schemes for the enforcement of the Charter provisions. The materials on "codification efforts" expose the ideological difficulties encountered in formulating universal human rights principles and the problems of obtaining agreement on measures of implementation.)

## PART III: REGIONAL HUMAN RIGHTS SYSTEMS

### *Chapter 6: The European Convention on Human Rights*

- A. Convention Institutions.
- B. Nature of Rights Guaranteed.
- C. Domestic Application of the Convention.

(*Note:* A selected number of relevant U. S. cases and various provisions of the U.N. Covenants will also be considered in this chapter.)

### *Chapter 7: The Inter-American System*

- A. The Inter-American Commission on Human Rights
- B. The American Convention on Human Rights

(*Note:* This chapter traces the evolution of the powers of the Inter-American Commission and analyzes the American Convention by reference to some problems that might be encountered if the U. S. sought to ratify that instrument.)

## THE DEVELOPING OF A HUMAN RIGHTS CURRICULUM

*By A. Luini del Russo \**

I shall confine myself to a few brief remarks on the substance and dimensions of what I would consider a meaningful Human Rights Seminar.

There are unquestionably many approaches to the teaching of the international aspects of human rights and all may prove effective, provided they respond to the expectations of the young men and women currently in our universities. It is no secret that today we are witnessing a basic revolt against hypocrisy: our youth is no longer contented with lofty statements of purpose and depressing everyday reality in the area of fundamental freedoms and social justice. They want *now* effective enforcement of human rights guarantees. Having lost faith in the ability or willingness of the state, "the establishment" if you will, to provide the full measure of human rights which they demand for mankind, they are seeking other means to obtain compliance. This is precisely why a comparative method in the study of the international law of human rights can open broader horizons and provide new answers to their challenging questions.

Let us start with the necessary premise that students coming into a seminar on the International Law of Human Rights, as I have been teaching for the past six years at Howard Law School, have already had a rigorous training in the domestic law of human rights or Constitutional Law II as we call it at Howard. A course on civil rights has been taught at Howard since 1936. One of my colleagues, Professor Elwood Chisolm, speaking at the round table on the teaching of human rights during the Symposium on the International Law of Human Rights held in 1965 at our Law School, traced the history of that civil rights seminar. He explained that it had primarily an experimental and clinical aspect. Students were constantly confronted with practical problems of litigation in the area of equal protection of the law. Thus, out of that seminar came the entire plan of attack against the "separate but equal" theory with all that followed thereafter.

Having made my students partners in the planning of the program for the seminar on human rights we have selected three main avenues of comparative study. In the general approach to that branch of the law they may be summarized as revolutionary in concept, effective in implementation and universal in response to basic demands.

At first we identify the origin of international concern for human rights with the decline of trust in the state as sole guardian of the fundamental freedoms of man, a concern highly justified by the course of events which led to the second World War. Hence the recognized need for the formulation of standards of human rights and for the establishment of institu-

\* Howard Law School.

tions at the supranational level to guarantee state compliance under the binding obligation of human rights conventions.

This, in essence, is the revolutionary nature of the international law of human rights where man has been accepted as a subject of the law of nations and states have stipulated to one another the right to intervene in each other's domestic jurisdiction, regardless of nationality ties with the individuals involved, in case of violations of fundamental freedoms. Thus the prevaricating state can be summoned before an international tribunal without being able to raise a defense of unlawful intervention. In addition, the right has been recognized in the individual to petition international adjudicating bodies to obtain redress of human rights violations by a sovereign state. It is then easy to conclude that human rights treaties have unique features which set them aside from the traditional body of conventional international law in that their object is the common humanitarian purpose of protecting individual rights rather than of creating subjective and reciprocal rights among states.

At the second stage of our investigation we expand our study beyond the mere conceptual analysis of standards, reaching down into the core of the problem to search for the effectiveness of existing institutional controls over state compliance; in other words, the heart of our deliberations is implementation. Here we underscore the pervasive influence of the Universal Declaration now truly forming part of customary international law, the important step forward taken with the two Human Rights Covenants, which one day, hopefully will come into force, the landmark Geneva Humanitarian Conventions, the remarkable contribution of the Convention on the Elimination of Racial Discrimination and the novel features of the Inter-American Convention.

Unfortunately, at the global level, we cannot yet present to our students a comparative analysis of implementation through international institutions. Human rights issues have remained so far political questions in the United Nations. They have not yet been converted into legal issues to be adjudicated in the impassive atmosphere of an international judicial body.

However, at the regional level, we can guide the students through a systematic review of the only international case law of human rights in existence today: the decisions of the European Court and Commission of Human Rights. Thus this semester my students have promptly discovered that two thirds of my recently published textbook on the *International Protection of Human Rights* is taken up by the analysis and evaluation of the jurisprudence of the European Convention. Nor can we discount the hundreds of court decisions in the 15 member states interpreting and applying the principles of that convention and the parliamentary debates on proposed amendments to constitutions and domestic laws to conform with its norms.

Through this review of a variety of concepts, guarantees and remedies, shaped and reshaped by multinational jurisprudence, the universal nature of fundamental freedoms comes alive very forcefully. Such issues as the



right of education of minorities, freedom of expression, the length of preventive detention, the legality of vagrancy laws and limitations on state emergency powers, litigated before the institutions of the European Convention, are found closely related to familiar domestic problems by our students of the comparative law of human rights.

Finally we reach the third stage, the study in perspective of the position of the individual vis-à-vis the state in diverse legal systems, where significant variants are brought about by political, religious and socio-economic factors. Unquestionably, there may be plural justifications for human rights, and for the manner of their recognition and protection. While our students have already grasped the reality of human rights as based on the nature of man, hence universal, they must also become aware of priorities established as to these important demands within the legal system of a particular political community and of avenues opened to the individual for redress. A comparative analysis of statutory law and Supreme Courts' decisions of selected states in the area of specific rights, such as fair trial, due process, freedom of expression, freedom from discrimination, and property rights, has been pursued effectively and enthusiastically by human rights students, with other added attractions as exploratory excursions into the field of the customary laws of emerging nations.

Equally valuable has been the investigation of peculiar domestic institutions for the protection of fundamental freedoms as the right of *amparo* in Mexico, the procuracy in the Soviet Union and the *ombudsman* in its original Swedish structure and in its recently revised versions in a number of states, including England and Ghana. Time permitting, further research is directed to the different concepts of separation of powers in certain states which may affect the remedies available for human rights violations as the judicial control on legislation and the judicial review of acts of the administration, or may impair the essential guarantee of independence of the judiciary.

In closing these remarks, with your permission I would like to quote from the concluding chapter of my book the following excerpt:

Courses in Human Rights should now be part of the regular curriculum of all colleges and professional schools in order to adequately prepare future leaders to find in the last quarter of this century new solutions to the multitude of world and community problems as to the guarantees of fundamental freedoms. Since man is the measure of human rights, the task of defining his freedoms as legal rights and of adequately protecting them involves a continuous response to human and social needs which are shaped and reshaped by the force of change inherent in man's world.

This statement followed in the path of the Conference of University Presidents held in Vienna in August, 1969, on the theme "The Rôle of the Universities in the Quest for Peace." At that conference a recommendation was adopted that there should be set up in every university a Chair for

the teaching of the Law of Human Rights at the national, regional and universal levels. I think it is time for us to do the same in the United States.

Professor HENKIN. We have been describing and prescribing the teaching of human rights to law students. But it is perhaps no less important that it be taught as well to undergraduates, and in various graduate faculties. The law schools have learned, though they have not effectively satisfied, the need for interdisciplinary attention to the problems of society, and the promotion and protection of human rights surely need it as much as any. Philosophy, anthropology, psychology and sociology, surely, ought to help enlighten us about the roots of human rights, the causes of their violation, and the drive to protect them. And why do some individuals in some societies at some times assert rights, while others do not?

For perspectives of the discipline perhaps most closely related to law, we turn to a political scientist who has studied, written and taught about human rights, Dr. Van Dyke.

#### REMARKS BY VERNON VAN DYKE \*

Human rights can be taught as the sole subject of courses or seminars or as part of a larger subject. I am involved in teaching human rights as the sole subject of a graduate seminar and of an undergraduate course.

At the graduate level the seminar is interdisciplinary. I co-operate with professors from Law, Religion, and Journalism. From twelve to eighteen graduate students have been enrolling, and we have met one evening a week through a semester. Two or three professors usually attend the meetings. The first several meetings are devoted to a general survey of the subject, and the other meetings are devoted to the discussion of papers written by the students and distributed in advance. Two meetings are given over to outside speakers.

At the undergraduate level I offered a course on human rights for the first time this spring, in the political science curriculum. The major problem here is to determine what the course should cover and to locate suitable reading material. I ended up putting considerable stress not only on human rights as such but also on the related questions of moral philosophy and political theory.

It is my belief that human rights should be taught far more than they are in a variety of courses. Material pertaining to human rights fits very appropriately into courses on the United Nations, on international law, on American foreign policies, on political theory, and on comparative politics. In various ways the fact should be called to the attention of the teachers of these subjects, and textbooks and other reading material should include discussions of human rights.

\* University of Iowa.

Professor RICHARD B. LILICH. This discussion is beginning to sound like a late evening talk show with all the panelists pushing their books. However, when I looked around for materials to use in my course this year, they were hard to find. Indeed, there are no materials as such. Yet this lack of materials proved to be an advantage in the long run. First of all, we did a preliminary study of human rights courses. We expected to find only a dozen of the major law schools teaching such a course. Instead, we found several dozen courses at all types of schools, large and small, East and West. We also found a great demand for materials.

At Virginia, in preparing some materials this year, we have experimented with the problem method. Essentially we passed out ten problems with supplemental readings assigned. Class members selected various rôles or positions to defend. This approach was designed to appeal to the kind of student who is less motivated toward international law than toward human rights generally. The disadvantage of this method is the sacrifice of coverage, and the lack of a certain amount of conceptual framework. Yet the study of fewer subjects in depth probably is preferable, in my estimation, and this approach certainly appealed to our second and third year students.

In selecting problems, several factors were important, one important criterion being that the problem involve a contemporary issue. Moreover, most of the problems raised domestic Constitutional questions and also problems of foreign relations.

The first problem concerned humanitarian intervention for Armenians in Turkey. The second concerned hijacking to the Jordanian desert last fall and raised questions about the protection of nationals abroad and regional enforcement, as found in the Dominican Republic crisis. The third involved the right of petition to the United Nations, while the fourth dealt with hearings before the Foreign Relations Committee on the Genocide Convention. The fifth raised violation of privacy questions by having the Virginia Motor Vehicle Commission sell its list of licensed drivers to an Ohio firm for advertising purposes. The sixth dealt with the conflagration in Northern Ireland, and the seventh involved the American Convention on Human Rights signed in 1969. The eighth explored the laws of warfare in Viet-Nam, while the ninth concerned South Africa's control over South West Africa. Finally, the last dealt with proposed legislation lifting U.S. sanctions on Rhodesia, recently introduced by Senator Byrd and Congressman Robinson of Virginia, which would place the United States in conflict with Article 25 of the U.N. Charter.

Professor HENKIN. We have been given at least three possible approaches to our subject, and several particular issues have been raised, *e.g.*, how much philosophy and intellectual history to include. Comparative study is clearly valuable; is it indispensable? One omission that has struck me is the lack of attention to the activities of non-governmental organizations at the United Nations and in various countries. What questions and methods can the social scientist provide for international human rights? And we have not talked about research, including interdisciplinary research.

Can the social scientist tell us how much difference the international protection of human rights has really made, can make? Can he at least tell us how that and other questions can be investigated?

I now turn to members of the audience for their comments and questions.

Professor LILICH. May I suggest that we call on one of my students who can present the findings of the survey I mentioned earlier?

Mr. BERT B. LOCKWOOD. We took a survey through questionnaires to the international law professors. We asked how many courses were taught in the field at their schools and were they interested in a casebook? To question 1, twenty-three professors responded. Only thirteen actually teach international human rights law. At N.Y.U. there is mention of it in a comparative constitutional law casebook. Two taught some human rights in a law-of-war course, while the rest touched on it in an international criminal law course. Out of a total of 304 questionnaires sent, over 185 were returned, a 54% response. 83 indicated an interest in teaching human rights (including those presently teaching such a course). Those interested represented 63 law schools of varying sizes. 19 were from schools with faculties of 30 or more; 24 were from medium-sized schools (20-30 faculty members), while 20 were from smaller schools, with less than 20 professors. Those professors currently teaching a course in human rights are Sohn at Harvard, Bilder at Wisconsin and Michigan, Carey at N.Y.U., Newman at Berkeley, Nanda at Denver, Henkin at Columbia, Marroney at Syracuse, Van Dyke at Iowa, Lillich at Virginia, Del Russo at Howard and Georgetown, and McDougal at Yale.

Professor HENKIN. I note here that the United States Institute of Human Rights is sponsoring the preparation of a major human rights bibliography. It is being prepared under the supervision of Frank Newman at Berkeley.

Professor BURNS H. WESTON. I cannot conceive of any right that is not human. The problem is to delimit the sphere of inquiry. One way is by co-ordinating the interdisciplinary approach, as suggested by Professor Van Dyke, with the problem-solving method of Professor Lillich. And in so doing, it becomes necessary to pull together masses of data from all fields. But this is very tough business. My question is, What are the possibilities for true interdisciplinary analysis, especially in light of the difficulties that are involved in trying to spread the *interdisciplinary* message with an *intradisciplinary*-oriented profession?

Professor VAN DYKE. This depends on the differing needs of differing schools, and the kind of course that is appropriate. What is suitable in a law school curriculum might not be equally suitable in a program leading to an A.B. or a Ph.D. Of course, there is overlap. A good deal of what Professor Buergerthal is doing, for example, looks as though it would be applicable to my undergraduate course on human rights.

Professor HENKIN. We might ask what questions should we ask of each of at least four or five relevant disciplines. And they will have to help us formulate other questions.

Professor LELAND M. GOODRICH. I have participated in an interdisciplinary course at the University of Toronto. There we found problems

similar to those described by Professor Van Dyke: there is no common background among the students. The faculty was easy to assemble. Usually law, business, sociology, and history are represented. We approximate the problem approach. Using some of the focus of political science, we explore the process by which international organizations achieve respect for human rights. A study is made of the means by which to achieve compliance with a variety of international standards formulated in treaties, court decisions, General Assembly resolutions.

Professor JOSEPH CHACKO. May I say that I thoroughly appreciated the sincere and able manner in which the speakers presented some of the problems concerning "Human Rights." At the same time, I must candidly confess that it is not quite clear to me how the procedure for the enforcement of such rights could be a matter of international jurisdiction. Obviously, these rights lie within the ambit of municipal law and jurisdiction, and are, therefore, dependent upon the national sovereign state for purposes of enforcement. International courts do not, as a rule, possess any executive authority or capacity for taking any enforcement actions in such matters. In the light of this contingency, is the proposed course a worthwhile project to pursue?

Dr. DEL RUSSO. This is the reason that the emphasis in my book is on the treaty law of human rights under the European Convention, where 15 states have agreed in advance to accept the international jurisdiction of the institutions of the convention. Two thirds of the casebook involve case law showing the influence on domestic law of the new international conventional law of human rights.

Professor LILLICH. I think this point raises the old question, How do we define international law? Are human rights relevant to the international field or not? I think they are.

Professor VAN DYKE. The importance of human rights in existing international law is not crucial to the question whether to include some teaching about them. We can discuss goals and the conditions and methods of achieving them.

Professor HENKIN. Surely there is substantial international law on human rights, by any definition of international law.

Mr. JOHN R. WILLIAMS. It is my hope that human rights would become a part of the common knowledge of mankind. In Cleveland, we have a Council on Human Relations. Two professors helped develop a panel and accompanying report of the work of the United Nations and the Human Rights declarations. We have drawn up a chart of the United Nations institutions and an outline of its various committees. These materials are used in a thirty-minute presentation in the high schools under an Urban Affairs Program series. Materials and talks as to international law in the International Human Rights Covenants are distributed.

Professor VED P. NANDA. I have conducted an interdisciplinary seminar at Denver which proved to be quite successful. A selected group of 15-20 students has looked into various aspects of human rights. I have used the problem method which I find quite satisfactory. The conceptual question as to the nature of human rights and their universality is perhaps

a hard one to grasp. Now a question: Does the Buergenthal casebook use the case of the Greek expulsion?

Professor BUERGENTHAL. Yes, we include the Greek case and use it in part as an example of the political limits of international human rights law. We found that there is a distinct difference in the subject awareness of American and European students. Therefore we had to fashion the materials accordingly.

Dr. DEL RUSSO. In my casebook we draw the comparison to South Africa. This provides an excellent illustration of the objects and possibilities of human rights problems.

Professor HENKIN. We touch here the general problem of teaching a more activist group of students. They seem to expect the classroom to change the world rather than describe it.

Professor DAN TURACK. What substantive and procedural law is expected as a prerequisite for studying human rights?

Professor LILICH. I doubt whether you need any international law, but it definitely is helpful.

Dr. DEL RUSSO. I would suggest Constitutional Law II or Civil Rights.

Dr. SCHWELB. I think you need a Constitutional and Administrative Law background in order to get the full understanding of human rights problems on the international plane.

Professor BUERGENTHAL. I could not teach the subject to Americans if they did not have a Constitutional or Criminal Law background. International law is less important.

Professor STEPHEN GOROVE. I believe that we must also face the problem of the small and medium-sized law schools. It may create little or no problem to introduce a new course on Human Rights at some of our big universities but I do not think the same holds true at our smaller schools. It is common knowledge that international law has for long been the unwanted stepchild of our profession. With the already existing pressures for the addition of new courses to the curriculum, plus the fact that most smaller schools already offer a number of courses in the international field, such as International Law, International Business Transactions, International Organization, how can one sell still another course on Human Rights?

Professor LILICH. It is difficult *not* to sell a human rights course. It is like God and Motherhood before they became unfashionable. Moreover, a good case can be made that such a course is the best way of introducing blacks to the relevancy of international law.

Professor HENKIN. A State university may also face problems with its legislature. A possible solution is to offer the course in alternate years. One could also include it in a general seminar. Many schools offer courses like "Selected Problems in - -" or "Developments in - -," and at least during some years human rights can be the subject or one of the subjects studied.

Professor FRANZ B. GROSS. I am familiar with the problems of the smaller schools in providing interdisciplinary studies. Therefore I disagree with Professor Schwelb that administrative law is necessary. As a

substitute one could offer a good reading list, a library reference sheet, and seminars inviting outside professors. I would also note the advantage of different courses of international law, international organization and a senior political seminar as providing different perspectives on the matter.

Dr. BARAKAT AHMAD. I wish to make several observations on the methodologies discussed. First, it is clear that the scholar has abdicated his responsibility to the journalist. Second, the subject matter seems to be written in an American-European context, with the European view dominating. There seems to be a lack of understanding of the local situations in other areas such as exist in Africa or Asia. For example, in India in 1948, an important document, the Nehru-Liaquat Pact, was signed concerning the minorities in India and Pakistan. Third, and this is very important, I note the absence of objective literature written by the minorities themselves, with the exception of perhaps the Jewish scholars, who have produced several studies and scholarly works, both propagandist and objective, on the treatment of Jews.

Professor BUERGENTHAL. We are aware of this problem. Consequently we deal with the protection of minorities in our casebook and not only in the European context.

Mr. JEFFREY MAO. May I direct two questions to Professor Van Dyke. My first question is whether, in teaching human rights, we should urge greater emphasis on human responsibility as well. The second question relates to the implementation of human rights or possible intervention by the United Nations. In the United States the protection of civil rights often brings into play the conflict of national power *versus* States' rights. The problem becomes a question of jurisdiction. The promotion of human rights in the international realm may eventually require action by the United Nations. Does this mean that while advocating international human rights we are actually advocating a stronger world government?

Mr. ARNOLD FRALEIGH. I would like to have more information on the United States Institute of Human Rights.

Professor ALEXANDER J. WALKER. What is the basic purpose of our discussion of human rights? The nexus seems to be gathering of information. I feel we should focus on implementation, not accumulate data. We should focus innovations of thought on the closing of the gap between theory and reality. This must be achieved. International human rights is always taken out of the context of intervention.

Professor LOUIS B. SOHN. I should like to make a few observations on the discussion. First, in reply to an earlier comment, I would suggest Tom Franck's casebook on Comparative Constitutional Law, which provides valuable source material in this field. He went outside the Western world and introduced human rights cases from the developing countries. Second, in response to the query of how to teach, I urge the introduction of non-international law matter into the course. Third, in the debate between the historical development of case precedents and the problem approach, where you investigate current cases, I submit they are both the same. While they start in different time-frames, one going backward and one

forward, they end up crossing at some point. An ideal compromise would be to use both methods in some sort of a mixture.

Mr. SIDNEY LISKOFKY. I speak as a non-academician. I suggest more attention to the theory and practice of governmental reporting in matters of human rights. There exist a variety of contexts in which governments are invited or requested to provide reports on their progress and problems in complying with particular norms or in carrying out certain goals or programs. Examples are the Periodic Reports under the Human Rights Commission's Advisory Services program and the reporting procedure under the Convention on the Elimination of All Forms of Racial Discrimination. Since United Nations bodies appear unable at this juncture to perform effectively the rôle of objective analyst and critic of governmental assertions, academic and other non-governmental institutions can make important contributions by trying to fill the gap.

Professor HENKIN. Since time is drawing short, we should allow each panelist a short summation.

Professor VAN DYKE. I was intrigued by Mr. Mao's comments on responsibility. I agree that human rights imply human responsibilities. One of the traditional questions in political theory has concerned the relations of man and the state or, to put it more suitably for present purposes, the relationship between the state and those under its jurisdiction. As I see it, political theorists should broaden the question and ask about the responsibility that one state may have for the fate of those under the jurisdiction of other states. Is the implementation of human rights purely a domestic question, or is international action to occur as well? What kinds of international action? Professor Henkin's question is appropriate here, whether the formal acceptance of treaty obligations pertaining to human rights is likely to make a difference, and this is related to the broader question whether law makes a difference. Under what conditions is law—treaty law and other law—observed and enforced? Why do we enforce some laws and not others? How can we promote human rights abroad without doing more harm than good, or without being drawn into the assumption of greater burdens than we are willing to bear?

Professor LILLICH. The problem method is exceptionally suited to an international human rights course. By using this approach, one naturally includes a lot of non-international law material. Constitutional law is not specifically emphasized except with respect to the treaty-making power, when I do ask questions such as how can we effect social change through the treaty-making power, and do we want to take this route. A human rights course such as I have outlined today shows the interrelationship between domestic politics and international standards, too.

Dr. DEL RUSSO. Again in response to the earlier criticism of Western bias, I might add that a course on human rights should depend a lot on the interest of the students. For instance, we have tried to expand the breadth of comparative study to such problems as freedom of expression and sedition laws as decided by the Supreme Court of India under the



Indian Constitution and freedom to marry and the position of the woman under Islamic law.

Professor BUERGENTHAL. I agree with the speakers who expressed the belief that some time should be devoted in a human rights course to the question "What are human rights?" I have found that this topic can be effectively dealt with by exploring the ideological assumptions that are reflected in some U.N. human rights codifications.

In conclusion, let me say that I have found today's session most enlightening. The very fact that we have had this discussion and that it was co-sponsored by the American Society of International Law shows that we have made some real progress.

Dr. SCHWELB recalled that in 1949-1950, by an agreement between the Economic and Social Council and the Governing Body of the International Labor Office, independently of any new treaty, machinery for the protection of freedom of association for trade union purposes was established which has been operating with considerable success for almost two decades.

He stated, in support of the demand that the law of human rights should be taught and studied that, when the International Law Commission was preparing what subsequently became the Vienna Convention on the Law of Treaties of 1969, it could be noticed that even leading members of the Commission were not familiar with, *e.g.*, the right of petition as established by the European Convention on Human Rights.

In his introductory statement Dr. Schwelb did in no way mean to neglect the global aspects of the question. He did not accept the myth, however, that different regions of the world required different substantive provisions for safeguarding human rights. This myth is rebutted by the fact that, subject to minor differences, the substantive law, as distinct from procedural arrangements, of the International Covenant on Civil and Political Rights, of the European Convention on Human Rights and of the American Convention on Human Rights, is practically the same.

Professor HENKIN. Before closing I wish to respond to some earlier inquiries which went unanswered. For information on the U.S. Institute, I refer to the note in the recent issue of the *Journal*.<sup>1</sup> I would also refer to the Institute's U.N. Human Rights Documents service, under the supervision of our Secretary, John Carey. As I mentioned, the Institute is preparing a bibliography which should be ready some time this year. We hope also to collect teaching syllabi from some of you and arrange to make them available to others. Finally I note that our rapporteur, Mr. Hill, organized a Columbia Institute of Human Rights which sponsored a series of bag lunch seminars on human rights topics. Perhaps this might serve as a spur and a model to students at other law schools.

I thank all the panelists for their time and effort. When we conceived this panel we thought we were the only ones interested in the field. Today's attendance and discussion prove otherwise. It is heartening and promising.

The meeting was thereupon adjourned.

<sup>1</sup> 64 A.J.I.L. 924 (1970).

## FIFTH SESSION

Friday, April 30, 1971, at 2:15 p.m.

### What Future for the International Court of Justice?

The session convened at 2:15 o'clock p.m. in the Presidential Ballroom of the Statler-Hilton Hotel. Ambassador EDVARD HAMBRO, President of the United Nations General Assembly, presided. He presented Judge Philip C. Jessup, former Judge of the International Court of Justice.

## DO NEW PROBLEMS NEED NEW COURTS? <sup>1</sup>

*By Philip C. Jessup \**

Although we have it on ancient authority that "There is nothing new under the sun," the world seems constantly to be faced with problems which seem to contemporary man to have at least elements of novelty. Certainly the vocabulary of science—of all the sciences—abounds in new terms, many of which at least must refer to new phenomena, new data, new concepts. In the management of international or transnational relations, do we need to innovate? Are our existing organizations outmoded, incapable of grappling with the problems of this technocratic age?

I have no intention of trying to answer such questions as these in all their vastness. I mention by way of illustration, only one area where awareness of the problems—not the problems themselves—is relatively new and where one wonders whether our relatively old international institutions are adequate to deal with them. The problems are those of protecting our environment, the institutions are those which form the United Nations complex and others of regional scope or of non-governmental composition. Even here I must in the compass of this paper be more selective, considering whether the International Court of Justice, "principal judicial organ" of the United Nations, can be profitably used in the solution of the problems of environmental protection.

I suggest that the topic is relevant because the International Court of Justice is now being reappraised pursuant to a resolution adopted at the last session of the General Assembly and because the international community is preparing for the United Nations Conference on the Human Environment to be held in Stockholm in 1972.

Let me begin with some generalities about the Court. Many discussions of the Court and its future usefulness seem to be based on the image of the Court as a body of 15 men sitting in an ornate national monument,

<sup>1</sup> I am indebted to Mrs. Edith Brown Weiss, LL.B., an expert on weather modification, for assistance in collecting materials used in these remarks.

\* Former Judge of the International Court of Justice; Honorary President of the Society.

listening day after day after day to unlimited speeches and then deliberating for weeks or months before pronouncing judgment or rendering an advisory opinion in divergent voices. The Court is what the states of the world choose to make of it. The Court can indeed improve its procedures but it is the states which must take advantage of the potentialities which already exist in the Court's Statute.

The Court is not required to sit *en banc*; it may sit in small groups which the Statute calls "chambers." One chamber is for summary procedure and the number of members is specified—it is five and they are elected annually by the Court. Other chambers may be for "particular categories of cases" and these are to be composed of 3 or more judges. Then at any time the Court may "form a chamber for dealing with a particular case." The size of such a chamber is to be determined "by the Court with the approval of the parties." The parties are of course states, and it is they who can decide how many judges they want to have in that chamber. It is true that it is only the Court which can establish chambers "for particular categories of cases"; for example, cases of pollution of the environment, conservation of natural resources, activities in outer space and the like. But who can doubt that if the international community, through a resolution of a conference or of the General Assembly or of ECOSOC, called for a chamber of any such kind, the Court would comply?

Suppose, however, the international community dislikes the idea of the Court forming a chamber which would be composed of three judges chosen by the Court; the category of cases envisaged might be highly technical and it might be thought that there would not at any given time be three judges on the Bench with the necessary expertise. The Court, under Article 30, may provide for assessors to sit with it or with one of its chambers.<sup>2</sup> These assessors could be persons with special technical competence. The Rules of the Court now provide, in Article 7, that the assessors shall be appointed by secret ballot and by a majority of votes, but the rule can be changed. Following the plan in Article 26 (2) of the Statute, the number of assessors to sit with a chamber could be determined by the Court "with the approval of the parties." It might, for example, be provided in a general international convention dealing with pollution of the oceans, that in case of an allegation that a state was responsible for a violation of a provision of the convention, the charge should be heard by a special chamber composed, for example, of one judge of the Court with two technical assessors to be appointed by the Court on the nomination of IMCO and FAO or by some other international body or bodies. If the tribunal thus constituted ran into difficulties, the Court could act under Article 50 of the Statute to entrust "any individual, body, bureau, commission or other organization with the task of carrying out an enquiry or giving an expert opinion." I see no reason why the Court could not delegate such

<sup>2</sup> Assessors may be characterized as being almost assistant judges, without the right to vote. They are thus different from "experts" who are often used by national courts of various legal systems and by international tribunals. The institution of assessors deserves more detailed study.

selection to one of its chambers. In this way the whole of the world's expertise, individual or organizational, could be utilized.

What I am suggesting is that the Court under its existing Statute is an extremely flexible instrument. There are advantages in making use of it. It is already established with an efficient Registry, accustomed to the use of various languages. Its budget is part of the budget of the United Nations and is provided for in advance. It has a fixed seat with which communication is easy. It is to be expected that it will in due course have a new building and if the world community is provident enough in allocating various functions to the Court, they could be adequately accommodated in the plans for a new Palace of Justice. While the system of electing judges may be antiquated and the safeguards designed to insulate it from political favoritism may be inadequate, the states of the world can exercise their powers in the electoral chambers of the General Assembly and the Security Council in such a way as to assure the choice of the best candidates.

We are told that the International Court of Justice applies an antiquated Western-bred international law which the newer states refuse to accept because it does not fit their needs or desires. In the situation which I have given as an illustration, the problem of the Court (sitting as its hypothetical special environmental chamber) would not necessarily call for the application of wide-ranging rules and principles of international law. In the main, the task would be to supervise the expert ascertainment of facts and then to interpret the applicable treaty. The Vienna Convention on Treaties supplies a legal base on which the Court can safely rest since that convention was drawn up with the expertise of the broadly-membered International Law Commission and vetted by an international conference in which all states, old and new, could participate in full equality. It may be said that not all states have ratified, but this does not prove that hesitation to ratify is related to the particular articles which could help the Court in its task of treaty interpretation.

However, the United Nations Secretariat, in its 1949 Survey of International Law (U.N. Doc. A/CN.4/1/Rev. 1, p. 34), concluded that there is an "aspect of international law as to which there exists already a substantial body of practice" covering such matters as "injurious economic use of territory, the law of nuisance, improper interference with the flow of rivers"<sup>3</sup> and others. The Survey mentions the most celebrated international case in point—the *Trail Smelter Arbitration* between the United States and Canada. The Tribunal in that case referred to a Swiss case, to several cases on water pollution and to a case in the United States Supreme Court which also dealt with a situation in which poisonous fumes crossed a State boundary. Specific rules giving content to such principles will probably be incorporated in international conventions, as they have been already in the IMCO Convention for the Prevention of Pollu-

<sup>3</sup> The Helsinki Rules on Dispute Settlement on International Rivers provide an elaborate scheme of steps all the way from negotiation to the International Court of Justice.

tion of the Sea by Oil of 1954 as amended in 1962 and 1969.<sup>4</sup> Article XIII of that convention provides for the compulsory jurisdiction of the International Court of Justice. So does Article 31 of the United Nations Convention on Psychotropic Substances of February 21, 1971.<sup>5</sup> One may expect an international convention on regulation of weather modification, a subject which is no longer to be classed in science fiction, although to the layman the developments in the science still seem scarcely credible.

Time and space do not permit me here to elaborate on the events following the passage of the Canadian Arctic Waters Pollution Prevention Act. They are admirably analyzed by Professor Bilder in his article in the *Michigan Law Review* for November, 1970. I must merely state that Canada refused the proposal of the United States to submit to the International Court of Justice the question whether the Canadian claims were justified under international law, and the Canadian acceptance of the compulsory jurisdiction of the Court was amended to exclude such questions.

In the environmental context one must also include measures for conserving natural resources of the oceans and the forests and the jungles. The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas<sup>6</sup> in its Article 9 provides for a special type of commission for the resolution of disputes under that convention. The five members of such a commission are named by agreement of the states, failing which agreement, they may be named by the Secretary General of the United Nations in consultation with the states and with the President of the International Court of Justice and the Director General of FAO. The requisite expertise of the commissioners is described, and one such quality is specialization in the legal aspects; such a specialist might at any time be found on the Bench of the International Court of Justice. Even in the choice of members of the advisory panel which aids the Council in settling disputes under the International Coffee Agreement of 1968, one person is to have "legal standing and experience" not necessarily related to coffee culture (Article 59 of the treaty).<sup>7</sup>

To illustrate what I have in mind by the use, in some form, of the International Court of Justice and its Bench, I take as an example the excellent draft treaty prepared by the Department of State to provide an international regime for the seabed. It was submitted to the General Assembly last year (U.N. Doc. A/AC.138/25). Article 46 of that draft provides for establishing a special tribunal to "decide on all disputes and advise on all questions relating to the interpretation and application of this Convention which have been submitted to it in accordance with the provisions of this Convention. In its decisions and advisory opinions the Tribunal shall also apply relevant principles of international law." If authorized in accordance with Article 96 of the Charter of the United Nations, the Tribunal may ask the International Court of Justice for advisory opinions.

<sup>4</sup> 9 Int. Legal Materials 1 (1970).

<sup>5</sup> 10 *ibid.* 261, 284 (1971).

<sup>6</sup> T.I.A.S., No. 5969; 52 A.J.I.L. 851 (1958).

<sup>7</sup> T.I.A.S., No. 6584.

According to Article 47, the Tribunal "shall be composed of five, seven, or nine independent judges, who shall possess the qualifications required in their respective countries for appointment to the highest judicial office, or shall be lawyers especially competent in matters within the scope of this Convention." Note that these qualifications are in the alternative, that is, special expertise in seabed problems is not required of all judges. The qualification of eligibility to highest judicial offices is of course taken from Article 2 of the Statute of the International Court of Justice. It is not generally meaningful, since in the United States, for example, there are no general rules for eligibility to appointment to the Supreme Court of the United States. In any case, the members of the I.C.J. technically fulfill all the requirements specified for the tribunal on the seabed.

Article 48 of the seabed draft indicates how the judges are to be selected. Each Contracting Party may nominate candidates—the number is not indicated. The Council (composed of 24 members, the manner of whose selection is specified in Article 36), elects the Tribunal from the list of nominees. Why is this procedure more likely to produce a bench of qualified judges than the procedure laid down in the Statute for the election of members of the International Court of Justice? Would not a chamber of the Court for seabed cases, composed of 5, 7, or 9 members of the Court, serve equally well? Provisions about the competence of the tribunal, its procedures, etc., could be applicable to a chamber of the Court, and the Court would have jurisdiction under Article 36 of its Statute which enables it to deal with "all matters specially provided for . . . in treaties and conventions in force." The Rules of Court could provide that when a case is referred under the seabed treaty, the procedural rules specified in that treaty shall be adopted and applied by the Court.

The Department's seabed treaty provides for a Secretariat but that Secretariat will be burdened by a multitude of duties. There is no apparent reason why it would serve the proposed tribunal better than would the Registry of the I.C.J. serve that Court if it were given seabed jurisdiction.

There is, however, one serious drawback to the proposal that the International Court of Justice should function as the environmental tribunal. That drawback stems from Article 34 of the Court's Statute which provides that "Only states may be parties in cases before the Court." This limitation applies also to chambers of the Court. This provision denies to international organizations the right to be parties in such cases, although many of them are empowered to request advisory opinions. I do not believe that the Court can interpret the word "states" to include international organizations. Article 34 denies the right of access to individuals and to corporations, even the great multinational corporations which are absorbing in many respects the traditional rôle and status of the national state. It would be folly to provide for the settlement of disputes under environmental treaties without opening the tribunal or administrative body to those entities which will be as much concerned with enforcement of the new standards as will governments of states. But one cannot blink the fact that the old-fashioned dedication of the Court to states—which were

the only acknowledged persons of international law when the Court was created—is embedded in its Statute which can be amended only with the approval of two thirds of the members of the General Assembly, including the five permanent members of the Security Council. One of those members, the Soviet Union, has made it plain that it is afraid of amending the basic constitutional instrument.

This does not mean that the International Court of Justice has no contribution to make to the new institutions which are surely going to be developed to protect the environment. Under Article 27 of the Statute, a judgment by a chamber “shall be considered as rendered by the Court.” But individual judges of the Court may serve as arbitrators or fact-finders. (There are certain rulings of the Court about incompatibilities, but I think my statement holds.) The Argentine representative told the Sixth Committee of the General Assembly at the last session that his government was considering the submission of a dispute with Chile to a tribunal to be composed of a certain number of judges selected from the Bench of the International Court of Justice. Obviously a decision by an *ad hoc* tribunal composed of members of the Bench of the International Court would not have the authority of a judgment of the Court itself, but it would have just as much, if not more, authority than an *ad hoc* tribunal composed of persons picked helter-skelter. Instead of setting up an elaborate new machinery for selecting judges for an environmental tribunal, why not pick one or more from the panel which the Bench of the International Court of Justice affords? If desired, the aid of the Court could still be sought in the selection of assessors, subject to approval of the parties. Each year the President of the Court fulfills a duty given him under bilateral treaties to select the umpire or president of international tribunals. The procedures for this are well established and, judging by the number of treaties which continue to provide for this function of the President of the Court, it would seem that the practice is widely acceptable.

I believe that the Registry and the facilities of the International Court could also be made available to an *ad hoc* environmental tribunal. This might require an authorization by resolution of the General Assembly, since the Registry and the cost of the building are paid out of United Nations funds.

If some should worry that the International Court of Justice would be unable to discharge the duties now assigned to it; if, as one hopes, more cases are submitted to it in accordance with traditional practice, it may be noted that under Article 25 of the Statute “A quorum of nine judges shall suffice to constitute the Court.” Assuming as many as five judges were occupied with a seabed or other environmental case, there would still be a quorum to constitute the Court even if one other judge were *souffrant*. Article 25 of the Statute does not present any insurmountable difficulty.

I do not believe that the members of the International Court of Justice when not actually called upon to deal with a case before the Court need to be kept on ice, like frozen foods in a deep-freeze to be thawed out for

service when the unexpected guest—or case—arrives. I can speak for myself (and I believe for other judges or former judges) in saying that the chief disadvantage of serving on that distinguished body has been enforced idleness. It must never be accurate to say that the position of a judge on the International Court of Justice is a sinecure. To assure an abundant work-load is also to contribute to the election of the ablest jurists.

Although the theme which I am exploring in the time available on this program is the possible utility of the International Court of Justice in settling disputes which may arise out of future environmental problems, I would not ignore the importance of national court adjudication, perhaps in the first instance. If, for example, one considers the conservation of wildlife, national legislation such as that in the United States can provide for criminal prosecution of importers of skins, furs and feathers of protected species. Indictments of this type are now pending in United States Federal courts. Municipal remedies are also being utilized to check pollution of lakes and rivers by the imposition of substantial penalties. It would be desirable for international conventions dealing with this series of problems to provide for municipal court action, as provided in the ICAO Convention of December 16, 1970, on aerial hijacking. That convention, in Article 12, contains a provision for the settlement of disputes concerning the application or interpretation of the convention. In case of failure to settle by negotiation or by some agreed form of arbitration, any party may refer the case to the International Court of Justice. Perforce, a supplemental paragraph of the same article allows signatory states to make a reservation excluding the obligation to resort to those provisions for settlement.<sup>8</sup> I think it is just as well that there is little support for the suggestion that a special international criminal court should be established to try hijackers.

I have mentioned the question of assuring the selection of the five best candidates for election every three years to the Bench of the International Court of Justice. No one will think that I intend criticism of any of the present or past members of the International Court of Justice if I discuss possible developments in future election practices. I shall not go outside the Statute in doing so.

Under Article 5 of the Statute, at least three months before the date of the election, the Secretary General sends out the invitations to governments inviting them to have their "national groups" undertake the nomination of candidates. Now "national groups" may be composed of persons who do not have the same qualifications as the persons they are supposed to nominate. That is perhaps why Article 6 includes the following provision:

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

<sup>8</sup> 65 A.J.I.L. 440 (1971); 10 Int. Legal Materials 133 (1971).



It is a pity this is stated merely as a recommendation and not as an obligation. However, it would seem to me entirely proper for the Secretary General, in issuing the invitations, to draw particular attention to Article 6 and to request each government to transmit for publication, with its nominations, a list of the groups or bodies which its national group has consulted. It might be too much to ask them to report how those consulted had voted, or what preferences they had expressed. The notifications of the nominations naturally include a *curriculum vitae* of each candidate, but more emphasis could be placed on such a statement of a candidate's qualifications.

If the international community decides to utilize the personnel of the Court for a variety of technical tasks as has been suggested here, it may be that there would be a desirable trend toward considering that the position of a judge on the International Court of Justice is the position of a legal and juristic technician and that every aspiring government will encourage or bring about the nomination of the most highly qualified persons who, in the words of Article 5 of the Statute, are "in a position to accept the duties of a member of the Court."

Chairman HAMBRO. I thank Judge Jessup for his extremely interesting address and I suggest that it would be a very good idea if more judges of the Court took the same liberty to discuss the important legal matters that Judge Jessup does. Of course, at times, I am afraid that members of the Court lean backwards so as not to commit themselves and give any kind of information at all to the interested public. I am very happy indeed that Judge Jessup has been more generous with his views and his comments about the Court.

## WHAT FUTURE FOR THE INTERNATIONAL COURT OF JUSTICE?

*By Hisashi Owada \**

1. I wish to begin by defining the general framework in which I intend to approach the problem concerning the future of the International Court of Justice. It seems important to set in the proper perspective the present situation in which the International Court of Justice now finds itself, before one can consider possible remedies to cure the situation and predict the future for the Court.

2. I am fully conscious of the fact that what I am going to say will sound quite commonplace. Nevertheless it seems to me worth re-emphasizing, as a point of departure, that the contemporary international legal community appears to be moving towards two apparently divergent directions. One trend tends towards a closer integration of the community. I might call this trend a vertical development in the sense that it is the deepening process within the sphere of application of international law towards the consolidation of the international community. The most con-

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spicuous example of this is the development that is taking place within the European Communities. It consists in a shift from independence to interdependence, from diversity to homogeneity. The integration of the community involves the integration of its juridical system, and this in turn necessitates the creation of a judicial machinery commensurate with the degree of such integration. Essentially this is a continuation of the course of development that the community of nations has been following for the last hundred years. It might be added that this new development, although most conspicuous in the case of the European Communities, is not limited to them. It is taking place in various fields especially with the recent developments in economic, technical and technological co-operation. It has thus created a situation where transnational approach is absolutely essential.

On the other hand, there has come into existence another trend, which tends to contrast with the first trend that I have just described, namely, the trend towards independence and diversity. This trend can be described as a horizontal development in the sense that it is the widening process of the sphere of application of international law, caused primarily by the sudden and vast expansion in the membership of the international community especially after the second World War. If the history of the international community for the last century or two has been the history of achieving a closer integration within an essentially European community, the birth of a number of non-European states has changed this traditional pattern almost completely. What is only to be expected, this is bound to affect the direction of the development of the international legal community as a whole, and therefore the outlook for the International Court of Justice as the judicial organ of this community. The impression is now being created as if we were thrown back to where we had started at least one century ago when the international community, which at that time consisted primarily of European nations, was plagued with the unrestricted assertion of national sovereignty and the positivist approach to international law.

Neither of these pictures is quite what the initiators of the International Court of Justice had in mind when creating the Court as the principal judicial organ of the international community. In brief, the present difficulties with which the Court is faced stem from the fact that the present Court, conceived as a further elaboration along the same line of the concept of the 1899-1907 Hague Convention system with its traditional outlook for the rule of international justice in the international community, is not designed to deal with these new developments.

If this analysis of the present situation is correct, then the future possibilities for the International Court of Justice must also be sought along these two essentially divergent lines of development.

The difficulty lies in the fact that these two lines of development are not basically going in the same direction, thus tending to create a dichotomy in the development of international law, and that therefore the remedies might also have conflicting effects. Essentially the question is to find the clientele for the Court. If one is too ambitious in one direc-

tion or the other, one might increase the degree of acceptability in one circle only at the risk of losing the degree of acceptability in another circle. If the International Court of Justice is to be truly "the principal judicial organ of the international community," then this situation should be avoided.

3. To take the first element first, it would seem highly desirable to have the Court updated to take into account "the unprecedented interdependence of States in their international relations, due above all to the phenomenal growth of transnational activities of individuals and corporations" (Gross at p. 269). If I have not misunderstood him, the main theme of Judge Jessup's extremely stimulating report concerns primarily this aspect of the problem. In a sense, his suggestion is concerned with the general question of how to cope with a host of new problems. In this sense, the ideas that Judge Jessup has offered us are not simply interesting. They will prove to be extremely useful and important in practice.

To put it more concretely, it seems desirable to take note of the fact that at present a number of different fora of judicial or quasi-judicial character are being created or being considered for creation in a variety of economic, technological and other technical fields. Thus, to give only a few examples, the International Bank for Reconstruction and Development has created a special arbitral procedure under its auspices for the settlement of claims arising out of investment. In the context of outer space, the United Nations Special Committee on Outer Space is currently examining a draft convention on compensation for damage caused by objects launched into outer space. Further, as has been pointed out by Judge Jessup, in the field of the exploitation of the deep seabed resources, the Draft Treaty on the International Sea-Bed Area proposed by the United States contains the idea of creating a special arbitral tribunal to deal with questions arising out of the exploitation. These and other similar fora are being created mainly because the present International Court of Justice is felt to be inadequate for various reasons to deal with the type of technical problems involved. When one examines a little more closely, however, it will be found that the reluctance to use the International Court of Justice in these instances emanates not so much from the intrinsic limitation of the Court as from the procedural and other technical inadequacies from which the present Court suffers.

I might add that the significance of this innovation will not be limited simply to one of replacing the International Court for tribunals specifically created to deal with the novel situations. Its implications may go far beyond that. The process of integration within a community will entail the integration of the legal system and thus the transformation of rules of international law as law governing relations between entities within the community to those of internal law of the community. This is precisely what is taking place in the European Communities. The rôle of the Court of the European Economic Community as stipulated in Article 177 of the Rome Treaty is clearly based on this philosophy. It might be that if we assign new rôles to the International Court along the line suggested by Judge Jessup, we would be creating a novel function for the Court

in a similar direction, though to a much more limited extent than in the case of the Court of the European Communities. In this regard, Article 56 of the Draft Convention on the International Sea-Bed Area provides a good prospect.

Another example in which a similar development might be possible and entirely desirable is the field of protection of various types of intellectual property. All these areas are regulated by international conventions of a lawmaking character. Seeing that the contents of these conventions are incorporated in their entirety into the domestic law, and that the subject matters covered by these conventions relate to transnational activities par excellence, it seems extremely important to ensure their uniform and harmonious interpretation and application. If this task could be assigned to the International Court it would prove to be extremely useful.

I might simply mention also that the kind of suggestion that Professor Leo Gross makes in his extremely comprehensive and highly instructive article in the latest issue of the *American Journal of International Law* and especially his suggestions under the chapters on access to the Court will fall within this area.

4. However, with all humility I suggest that this is not the whole problem, nor indeed the major problem that the Court is now confronted with in the contemporary world. What is at stake is not so much the question whether the Court is fully occupied and kept busy, as the question whether it is functioning in a manner commensurate with its status as "the principal judicial organ of the United Nations" and of the international community as a whole. This brings us to the second element that I referred to at the outset, namely, the impact of the horizontal development in the international community.

It is often pointed out that the present difficulty in which the Court finds itself is based on the philosophical, cultural, ideological and other basic differences which now exist among the increased membership of the international community, and especially among various groups of different affiliations and orientations, and that therefore the difficulty cannot be solved by improvements and innovations on a technical and procedural level. I do not totally reject this view, but I suggest that there is an element of overstating the case. Clearly there are divergence of views and unsettled points on a number of substantive rules in some branches of international law. But there is no reason to assume that such differences will affect the acceptability and credibility of international law as a whole. I am inclined to think on the contrary that the present situation is essentially transitional and that the balance of interests inherent in the system of international legal order will set in to stabilize the situation in the long run.

One added factor to aggravate the situation, of course, is the fact that the lessened tendency to use force in international relations, which had found legal expression in the General Treaty for the Renunciation of War and the Charter of the United Nations, has had an adverse effect on the willingness of states to submit to adjudication or arbitration. This para-

doxical situation can of course be detected in the whole field of peace-keeping under the United Nations system. But it has proved to be particularly damaging in this field of international adjudication, because it has not simply failed to improve the situation, but positively aggravated it. Thus, whereas recourse to arbitration was traditionally regarded as a protection for the weak against the strong, the situation is now frequently reversed and it is often the stronger party which looks to the law for the protection of what it regards as its legal rights and seeks arbitration or judicial settlement as a means of seeking such protection, as Dr. Jenks so cogently points out.

5. Seen in that light, it is clear that the movement for a large measure of acceptance of the International Court of Justice as a means of settling disputes can no longer draw strength from the emotional and political appeal that it could offer the only alternative to war. The Court at present will have a measure of utility and attraction only to the extent that it can offer the prospect of settling international disputes at no serious cost to the prospective litigants in the political, economic and technical sense. Thus, the effort to secure a wider measure of acceptance and use of the International Court of Justice should be sought in making the Court more readily available to the prospective clients.

There are a number of points that we might usefully consider in this context. I shall not attempt to deal with them in any exhaustive manner in view of the time available. Instead, I shall confine myself to indicating my preliminary thoughts on two major issues, namely, (a) some aspects of compulsory jurisdiction and (b) some aspects of procedural innovations to be brought in for the benefit of the prospective clients.

6. The first major issue is, of course, the question of compulsory jurisdiction. Everyone agrees that "the decline of the optional clause" is to be regretted. Also in this connection, it would seem to have become almost a fashion, both on the part of states and of commentators, to ascribe the blame largely to the decision of the Court in the *South West Africa* case. I do not deny that the case has had its impact, but at the same time I wonder whether the decision of the Court in that case has not been exploited, to a certain extent, as a major scapegoat to put the blame for the present malady primarily on the Court. I venture to suggest that at least statistics do not wholly bear out what is currently believed to be the situation:

Continents	Parties to Statute			Acceptance of O.C.			Percentage of Acceptance		
	1946	1960	1970	1946	1960	1970	1946	1960	1970
Europe	16	31	32	5	12	13	31%	39%	40%
America	22	22	27	9	11	11	41%	50%	40%
Asia	11	22	29	5	9	8	46%	41%	28%
Africa	4	25	39	1	4	11	25%	16%	28%
Oceania	2	2	2	2	2	2	100%	100%	100%
Total	55	102	129	22	38	45			

From these statistics, the following tentative conclusions would appear to suggest themselves:

(a) that Asia and Africa fall behind the average in the percentage of acceptance;

(b) that nonetheless the percentage for Asia and Africa is not *so* far behind those for Europe and for America, and that the rate of increase in the percentage from 1960 to 1970 is far higher than those for Europe and Africa;

(c) that regard is also to be had for the comparatively young age of most of the countries in Asia and especially in Africa, in contrast with countries in Europe and America;

(d) that especially the increase in the number of acceptances of the optional clause is considerable among African countries in the period between 1960 and 1970, a period in which the decision on the *South West Africa* case was rendered.

Under the circumstances, it would seem that there is still considerable room to work on states with a view to increasing the number of acceptances of the compulsory jurisdiction of the Court. For this purpose, what is wanting may well be the concerted effort for persuasion and education. Given the situation, however, the best prospect of securing wide acceptance of the optional clause would be found in making such acceptance an integral feature of some plan which will entail political, economic or other substantive advantages.

One idea along such lines was offered by Japan in the Sixth Committee several years ago. The representative of Japan suggested that we might examine "the possibility of making acceptance of the Court's compulsory jurisdiction a factor in deciding its composition, albeit with the utmost care to avoid any damage to its prestige." Admittedly, what is involved in this suggestion is a very delicate point, which might tend further to alienate the Court from its potential clienteles, in that the suggestion might be regarded as opening the way to a biased composition of the Court in favor of those countries which have accepted the optional clause. On the other hand, various devices may be conceivable which, without prejudicing the impartial character of the Court, will have the effect of inducing states to accept the compulsory jurisdiction of the Court.

7. Coming to the other major issue, namely, the question of procedural innovation to be brought in for the benefit of prospective clients, one aspect to which we might turn our attention would be the possibility of finding a middle road between the contentious and advisory proceedings. In many cases, especially in newly developing countries, a considerable amount of political responsibility will be involved in instituting proceedings against another state. This is true not so much because the act may appear to be an unfriendly act to the other side, as because an adverse decision by the International Court very often creates a political crisis within the country. Two examples will suffice to illustrate the point. My own country, Japan, lost its first case in international arbitration on the housing tax dispute at the turn of the century immediately after her entry

into the community of nations. This is thought to be one of the main reasons why Japan until the second World War did not accept the optional clause of the Permanent Court of International Justice and took an adamantly negative attitude to the concept of international arbitration. Following the *Preah Vihear Temple* case, in which Thailand lost to Cambodia, there was a political crisis in Thailand and the attitude of these two countries with regard to the International Court has since been in sharp contrast with each other, Thailand taking a negative attitude to the Court. All this difficulty might have been avoided or at least its impact mitigated if a device were to be found by which, when appropriate, a procedure which will solve a case in a little more indirect manner could be employed. In this respect, the recent decision in the *North Sea Continental Shelf* cases is worth our serious attention.

Another aspect in which an improvement of the functioning of the Court is possible would be the question of the cost involved in the litigation. It has sometimes been pointed out that recourse to the International Court is much less costly than recourse to a full-fledged arbitration. This may be true in many cases. But the point one has to keep in mind is that in practice the choice is not between the International Court of Justice and arbitration, but between recourse to the Court and leaving the situation in a stalemate. Also there is a vast difference between the case of a country which can employ her own legal experts in the service of the government and that of a country which has to hire illustrious names from abroad. A possible solution to this might be found in the establishment of a panel of lawyers from whose list the parties may choose their own counsel before the Court and the establishment of a system under which the cost thus incurred will be borne, *in toto* or in part, by the United Nations.

Again, the institution of chambers in session on a regional basis might serve a useful purpose if this can make the Court more readily available to the prospective parties. It should be pointed out, however, that the regional chamber in this sense should be an integral part of the whole Court. In other words, it would be the Court sitting as chambers outside The Hague. If on the other hand it should be the establishment of a regional court in its own right, whether it is related to the main Court at The Hague or not, I doubt whether the demerits of such a system would not outweigh the possible merits, since this system will destroy the uniformity of jurisprudence and thus do serious harm to the cause of the Court from the viewpoint of the stability and the harmonious development of the law.

These are no more than illustrations of what one might do towards making the Court more readily available within the limits that I have already described. I offer these by way of comments because I believe that these innovations and improvements in the procedures and functioning of the court, though limited to somewhat technical aspects of the broader problem, will nonetheless serve a useful purpose towards enhancing the effectiveness of the Court in the contemporary world.

8. One final word. I have deliberately avoided the argument on the question of the revision of the Statute, in suggesting various possibilities open to us for enhancing the effectiveness of the Court. This is because I feel that, although one should not be oblivious of the practical and political difficulties involved in the process of revising the Statute, one should not be inhibited from exploring, at least in this academic body, whatever merits our examination and recommendation towards this end.

### COMMENTS BY SALO ENGEL \*

Listening to Judge Jessup's paper, I think he has made an excellent case for the thesis that new courts are not needed for dealing with the new problems mentioned in his presentation. However, he seems to me to be rather cautious in his proposals for increasing the use of the Court. Essentially these consist in bringing technical cases before the Court to a greater extent than heretofore. He illustrated this by referring to the U.S. Draft Treaty on the International Regime of the Seabed and rightly pointed out that, "instead of setting up an elaborate new machinery . . . for an environmental tribunal," a panel from the bench of the Court as well as the Registry and the facilities of the Court should and could be used. Unfortunately, the fact is that the U.S. draft does *not* provide for such recourse to the Court and, if the American position is typical of the attitude of governments, the outlook for an increased use of the Court is rather dim. Moreover, this is really not the purpose for which the "principal judicial organ" of the United Nations has been created. The suggested use of the Court might, however, contribute to creating an atmosphere in which governments may become "conditioned" to using the Court in minor cases and thus lead to its use also in more important questions.

These more important questions have been considered by our distinguished speaker in a forthcoming article in the *Virginia Journal of International Law* on "The International Court of Justice Revisited," an advance copy of which has been put at my disposal through the courtesy of our Program Chairman. In this article, which deals with the recent General Assembly resolution on the future rôle of the Court, Judge Jessup raises a number of questions. Within the time at my disposal I have to confine myself to a few remarks. The Judge rightly points out that the present distrust in or lack of use of the Court is not due to its 1966 decision in the *South-West Africa* cases because the Court certainly was hardly busy even before that decision. In fact, what actually has happened in that case was that the minority in the 1962 judgment became, *inter alia*, with the President's casting vote, the majority in 1966. The Judge notes with approval the recent practice of the Court to submit annual reports to the General Assembly, a practice recommended to it by one of the Court's committees (composed of Judges Fitzmaurice, Khan, Ammoun and Lachs). In my humble opinion this practice should be "relaxed," as I have tried to show in a forthcoming Note in the *British Year Book of International Law*.

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In his dissenting opinion in the *South-West Africa* cases (1966), Judge Jessup also dealt with the problem of the interpretation of international instruments through the subsequent practice of the organs set up by such instruments. I have examined elsewhere the position taken by both the Permanent Court and the International Court with regard to such subsequent practice and have found that the Court did *not* consider such practice as a *res interna corporis* settling the issue with binding effect for other organs, including itself. On the contrary, while taking such practice into consideration, the Court felt free to evaluate it, accepting it or disagreeing with it as it felt appropriate. This raises a very interesting general question: the introduction of the judicial review of the constitutionality of action under the Charter. At present, as we all know, there is no judicial organ with the power to determine *erga omnes* whether a practice either of an organ or a Member of the United Nations is in conformity with the Charter. The Court's decisions have "no binding force except between the parties and in respect of that particular case" (Article 59 of the Statute). Nor is there even a general "political review," that is, review *erga omnes* by a *political* organ, of the constitutionality of action. In the absence of such general judicial or political review, I submit that everything which is being done must be considered to be right because there is no organ competent to say in every case that it is wrong. It may therefore be worth while to consider the question whether the Court should not be given the power of judicial review. I am, of course, aware of the fact that such a proposal was made at San Francisco and rejected. In the light of the intervening experience it should perhaps be reconsidered.

Why do I bring up the question of subsequent practice? Because "everything reminds me of subsequent practice" as in the story which I heard from Judge Jessup himself. Many years ago, at a time when our policy-makers had only the possible Russian reaction in mind and everything reminded them of the Russians, the Judge told the following story: A professor conducted an experiment dropping a white handkerchief and asking his students what this reminded them of. The first said that this reminded him of falling snow, the second, of a parachute and the third, of sex. "Why in the world does this remind you of sex?" the professor asked the third student. "Well, professor," he answered, "because everything reminds me of sex."

Chairman HAMBRO. I will now call on Mr. John Freeland, Legal Adviser of the United Kingdom Mission to the United Nations.

### COMMENTS BY JOHN R. FREELAND \*

As I am sure everyone here knows, the last session of the General Assembly and before it an item, of which the United Kingdom was a co-sponsor, on the review of the rôle of the International Court. The report

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of the discussion in the Sixth Committee makes worthwhile reading. The outcome was a resolution under which the item will reappear on the agenda next year. In the meantime, governments, and the Court itself, are being invited to comment and the Secretary General is to prepare a comprehensive report. The Assembly will decide next year on the further action to be taken. The question posed as the title for our present discussion—"What Future for the International Court of Justice?"—is therefore a very timely one from the point of view of international consideration of this question. Judge Jessup has suggested a possible future rôle for the Court in the environmental field in what he said this afternoon. I found his suggestions most stimulating and obviously worthy of careful consideration by governments. But I do not think that a rôle in this new field would provide a complete answer to the question "What Future for the International Court?"; nor do I think that Judge Jessup is suggesting that it would.

Although, predictably, some of the comments made about the Court at last year's General Assembly were disparaging to it, nobody went so far as to suggest that the institution should be abolished. And if the institution is to continue to exist, the United Nations, whose principal judicial organ it is, should surely make every reasonable effort to ensure that the greatest possible advantage is derived from it. There were, however, also those, including some traditional supporters of the Court, who felt it better to leave the situation alone than to risk making it worse. I believe this view to be overcautious and I hope that we shall be able at the next session of the General Assembly to demonstrate that the United Nations should at least take the initial step of setting up a suitably composed *ad hoc* committee on the rôle of the Court. The establishment of such a committee would be without prejudice to anyone's position on issues of substance and would enable a careful look to be given at all ideas for improvement. It is, on one view, no more than a procedural step; but it is an important one and one the difficulty of which none of us should underestimate.

I imagine that no one in this room would question that the contribution which the Court has been in a position to make in recent years has been disappointing in comparison to what were obviously the expectations of the drafters of the Charter. As for the reasons, Judge Jessup at the outset of his very interesting statement this afternoon said: "The Court is what the states of the world choose to make of it." My own belief, which is certainly not a particularly original one, is that the essential trouble is indeed a lack of confidence on the part of states. Like others who have spoken before me, I do not believe that the causes for this lack of confidence are to be found in the result of the *South West Africa* case, although that result may have had a contributory effect. Nor do I think it nowadays a particularly convincing reason for lack of confidence that there should be doubts about the law which the Court will apply. With the increasing reach of codification, that reason becomes less compelling every year. I think the most likely cause of the lack of confidence is simply that lack of activity breeds lack of confidence, and the most likely cure is for the

processes of international judicial settlement to be seen to operate usefully and effectively. There is obviously a certain circularity here. To break it some states have to show the way by an increased willingness to make the necessary act of faith and to resort to the Court for settlement of a dispute, however minor. Indeed, I would suggest that perhaps the best method of constructing confidence would be the submission of a series of minor cases, not touching vital interests, which would build up a practice for the Court. States should also be prepared to have a fresh look at the terms of their acceptances of the compulsory jurisdiction, as the United Kingdom did quite recently when it lodged a new and much simplified acceptance last year. States should also continue to work for the inclusion of provisions for reference to the Court in their treaties, both bilateral and multilateral. This may be far easier to achieve than agreement on a reference once a dispute has arisen. States should also be prepared to give careful consideration to imaginative ideas for the use of the Court and its judges such as those suggested by Judge Jessup this afternoon. But on this score I have one slight hesitation about what Judge Jessup said. I wonder whether giving increased currency to the possible rôle of the judges as members of *ad hoc* tribunals to function outside the strict ambit of the Court itself would enhance the rôle of the Court as a whole. If the Court began to be thought of too much as a panel of judges to be selected to act in outside capacities, this might foster an impression of it as an institution similar to the Permanent Court of Arbitration, a parallel which I do not find a comforting one.

The Court, too, has a contribution to make through a demonstrated willingness to make full use of the wide range of power it possesses. There is every reason to hope that the revision of its rules which is now in progress will be imaginatively conducted and that account will be taken of ideas such as those put forward by Judge Jessup. He has illustrated the potentialities of the Court for the settlement of disputes on technical matters. We have also seen possible advantage in such methods as the establishment of regional chambers.

I think it is by this kind of route, rather than by amendments to the Statute or the Charter, that improvement in the situation of the Court is likely to be possible in practice. Certainly, however, consideration of amendments to the Statute should not be completely excluded. At this stage all constructive ideas are welcome.

Chairman HAMBRO. I will now call on Dr. Leo Gross, Professor at the Fletcher School of Law and Diplomacy, Tufts University.

### COMMENTS BY LEO GROSS \*

I would like to remind you all of one fact which relates to the present composition of the International Court of Justice. The present composition of the Court, geographically speaking, is exactly the same as that of

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the Security Council of the United Nations. Whether that should be a factor which would encourage states to have confidence in the Court, or whether it would work in the opposite direction we shall find out in the next few years.

Our main speaker, Judge Jessup, and the commentators were right in stressing the flexibilities which are built into the Statute and which have not been sufficiently explored: the chambers, assessors, experts, commissions of inquiry and so on. They have all been there for fifty years and they have not been used or not been used very frequently. Therefore, I find that the Statute does need revision. I would like to suggest how it may be changed. We have to think in terms of removing some of the rigidities which are inherent in the present Statute. Unless we begin to think in terms of some rather drastic reform, the outlook for the Court is very dim.

I would like to make three suggestions. One relates to the advisory jurisdiction of the Court. In reference to the advisory jurisdiction I would suggest the possibility of amending the relevant articles of the Charter and the Statute to make it possible for states to include in a treaty a new form of jurisdictional clause whereby the states would agree that any one of the contracting parties could ask the Court for an advisory opinion on any question relating to the application or interpretation of that treaty. It might also be useful to consider the possibility of including in such a jurisdictional clause a provision which would make it possible for the states to agree in advance to accept the advisory opinion of the Court as binding.

My second proposal is for another type of jurisdictional clause which might be included in treaties or conventions which provide for a procedure of conciliation as the Vienna Convention on the Law of Treaties does. The new feature for such a commission would be to include a clause whereby the contracting states could agree that the conciliation commission may ask the International Court of Justice for an advisory opinion on the legal aspects of the issues pending before the commission. As you know, conciliation commissions are not necessarily bound to base their proposals on the applicable law. It might be helpful for some states to have the possibility to use the essential function of the commission and yet to make sure that law will get due attention. It seems that a useful way to achieve this would be to enable such commissions at the request of one party or both parties to ask the International Court of Justice for an advisory opinion on such related or underlying legal issues.

The third suggestion which I would like to put before you relates to a jurisdictional clause that states may include in a treaty whereby they would agree to allow their domestic tribunals to refer questions of international law to the International Court of Justice for preliminary binding decisions on the interpretation of the law. It is not a question of delegating any jurisdiction to the International Court as to the application of the law. My suggestion merely follows in the footsteps of Article 177 of the Rome

Treaty which established the European Economic Community and which provides for this type of procedure.

Governments should have a choice between the traditional jurisdictional clause whereby they agree to confer compulsory jurisdiction on the International Court. In addition to such a traditional clause they might include one or two or all three of the new clauses which I have suggested to you. I am very much impressed with the sentiment which has been expressed in the United Nations time and time again, and that is that governments are very much attached to the idea of freedom of choice. My proposals are based exactly on this notion of freedom of choice. Those states which want to include such jurisdictional clauses should have the facility to do so. No one would be bound to accept such clauses. No one is bound to accept the traditional clause. What I am proposing is merely to broaden the choice of procedures that could be used by governments which are so disposed. In order for states to have this greater freedom of choice it would be necessary to change one or two clauses in the Charter and Statute. This is not a superhuman task. It does not require states to do anything more than to open the way to the Court to those states which are willing to go to the Court.

Chairman HAMBRO. The meeting is now open to discussion.

Mr. J. MICHEL MARCOUX. I wish to address to Judge Jessup a question about the possible rôle of the International Court in determining the extent of the internationalization of the seabed world-wide. Since Antarctica is the only continent in the world without the landward interests of a "coastal state" for purposes of jurisdiction over its submerged offshore lands, as required by the 1958 Geneva Continental Shelf Convention, it appears to be an ideal laboratory for these law-of-the-sea jurisdictional issues. Do you not think, Sir, that the Court might have a valid rôle to play in the developing law of the seabed world-wide by determining the validity of the resource jurisdiction, out under the oceans, of the Antarctic Treaty nations?

Judge JESSUP. I would like to reply yes. It seems to me that this might be a very useful laboratory experiment which could be done without compromising the interests of the states involved.

Dr. CHARLES G. FENWICK. Before I put my question I want to pay a word of tribute to Judge Jessup for his long and admirable record. He makes me feel proud to be an American. My question is whether we cannot unite the services of the Security Council more closely with the International Court in order to distinguish more sharply between political and legal questions?

Judge JESSUP. I agree entirely. I think that if the political bodies in the United Nations, particularly the Security Council, had been willing to pick out a particular issue, like the right of passage through the Straits of Tiran and present it to the Court for determination, this would have been a great advantage in the ultimate settlement of the entire political problem.

Professor JOSEPH CHACKO. Mr. Chairman, the information that the International Court of Justice lacks an adequate number of cases to keep

that august juridical body duly occupied is indeed discouraging. In this context may I venture to ask whether it would not be a way out of the impasse if resort to the Court for advisory opinions, which under the present Statute is left entirely to the election of the disputing parties, be made a compulsory procedural responsibility on the part of all disputing states, prior to their having recourse to any other procedure. This does not mean that the Optional Clause as embodied in Article 36, par. 2, is to be ignored. It only means that if in every dispute Article 65 on Advisory Opinions is made a compulsory prerequisite, perhaps then the Court would have ample work on its hands and the avenue for pacific settlement would be widened. In an article I wrote a couple of years ago in the *Indian Journal of International Law*, which I used to edit, I pointed out such a possibility. Moreover, if we adopt the comprehensive term "transnational law," as Judge Jessup has very ably suggested, instead of the term "international law," the scope of work for the Court would certainly be increased. I would, however, like to know what the causes are for the dearth of cases coming before the Court, especially from the Afro-Asian states. I am very happy that Professor Leo Gross, a stalwart in the field of international law, recommends the greater utilization of the advisory procedure.

Dr. GROSS. In reference to your second question, I'm not sure that Judge Jessup, when he coined the term "transnational law," had in mind any particular content. I think the advantage of his approach was to break down barriers between different parts of the law.

As to your third point, the lack of trust in international law, there is no question that this lack of trust exists, not merely among the Afro-Asian nations, however. I think Mr. Owada was correct when he referred to the political effect which an unfavorable judgment may have in one country or another. On balance, however, I think the advantages of using the Court more frequently would be greater than the disadvantages resulting from losing one case or another.

Finally, your proposal to make resort to the advisory jurisdiction a compulsory and integral part of the process for the settlement of disputes raises difficult questions. Governments are notoriously reluctant to accept resort to any procedure as compulsory. Only less than one third of the states entitled to do so have accepted the jurisdiction of the Court as compulsory under Article 36 (2). My approach avoids compulsion and stresses greater choice in the manner of utilizing the Court.

Professor ENGEL. Mr. Chairman, it seems we have started to dream and I would like to bring us back to the harsh realities. A number of proposals have been made to expand the jurisdiction of the Court and I have in part indulged myself in such dreams in my earlier remarks. However, what is the use of dreaming about expanding the Court's jurisdiction when no use is made of the Court under its present jurisdiction? Is not the main problem how to induce governments to use the Court under the jurisdiction which it has *now*? In the environmental field the United States did not even consider bringing the Court into the picture but proposed

setting up a special tribunal for that purpose, as we have seen. Secretary of State Rogers, in his address last year to our Society, announced plans to increase the Court's business. The Court still being without a case on its docket, all that happened was that, on a Finnish proposal, it was asked for another advisory opinion on South-West Africa (Namibia)—an opinion which is no more likely to be heeded by South Africa now than were the preceding ones. Surely, there must be better cases in the drawers of the Departments of State of the United States and other countries which could be brought before the Court. So what is the point in suggesting additions to the Court's present jurisdiction if the latter is not being utilized?

Judge JESSUP. I would just like to make a few brief points. On the question of increasing confidence in the Court, I would agree with Mr. Freeland that success breeds success. It is much more important in the interests of the utilization of the Court and the development of international law if states would agree to submit to the Court cases of even minor importance.

On the question of the way in which national law might be submitted to the Court for advisory opinions, it has been suggested that the Assembly might create a special subsidiary organ and give it the authority to request advisory opinions to assist the Assembly in the solution of any controversy, dispute, or question submitted to the Assembly and within its jurisdiction. It might then be possible for individual governments to channel their legal questions through the subsidiary organ to the Court.

Mr. BRUNO BITKER. My question is directed to Judge Jessup. Do you think that making the members of the International Court of Justice international citizens and giving them life tenure, as once suggested by an American Bar Association committee, would increase the confidence in the Court?

Judge JESSUP. Frankly, while I was on the Court I thought the suggestion was rather insulting, as if the only way I could be freed from a bias in favor of my own country would be to be expatriated. It seems to me this is entirely wrong and it is really based on a false assumption about the judges. The assumption is that the judges are too responsive to the dictates of their own governments. On the average it does not seem to me this is true. People overlook the fact that a judge's appreciation of a legal position is something which stems from his own training. This may happen to be the same point of view which his government holds in regard to that particular question but it does not mean that he is subservient to his government.

Dr. BURHAN HAMMAD, Deputy Permanent Observer of the League of Arab States to the United Nations. The General Assembly passed, in its 24th and 25th Sessions, three resolutions that affirmed the inalienable rights of the people of Palestine, recognized that they are entitled to equal rights and self-determination, and condemned the government that denied them the right to self-determination. In invoking these three resolutions and the relevant provisions of the Charter that embodied the principle of

equal rights and self-determination, suppose the General Assembly passes a resolution seeking an advisory opinion from the Court on whether the resolution of the General Assembly on partition of Palestine in 1947 was an infringement of the right of self-determination of the people of Palestine, or whether these three recent resolutions make the partition resolution null and void. What would be the legality of such a resolution, and what would be the reaction of the Court? My question is directed to Judge Jessup and President Hambro.

Judge JESSUP. Mr. Chairman, I am very sorry. I have made it an absolute rule that I do not attempt to interpret what the International Court of Justice might decide on any international issue. I have no competence to do so. I have no way of ascertaining their views and I think it is quite improper for a former judge to speculate as to what his former colleagues and successors may decide on some particular issue which may be brought before them.

Chairman HAMBRO. Since I am the current President of the General Assembly, I will express the same point of view as Judge Jessup.

FROM THE FLOOR. My question is directed to Judge Jessup. Could not the International Court of Justice exercise appellate jurisdiction over the decisions of proposed international tribunals rather than take direct jurisdiction over cases?

Judge JESSUP. I quite agree that it would be extremely useful if such appellate jurisdiction would be provided in some of the general international conventions which are being concluded year after year. I think it is a perfectly feasible type of clause to draft. It would relieve the Court from passing on a very complicated state of facts in addition to passing on the law involved.

Professor L. F. E. GOLDIE. Does Judge Jessup's proposal for the development of specialized chambers for dealing with particular categories of cases also include the possibility of a non-judicial or quasi-judicial exercise of the function of umpire by the Court to supervise bargaining in good faith?

Is it possible to say that international public enterprises may get some kind of standing before the Court if the Court could be persuaded to regard them as providing a collective name for the bringing of representative actions on behalf of their constituent states?

Judge JESSUP. On the question of negotiation in good faith I think the answer would be generally yes. For example, in the *North Sea Continental Shelf* cases, if the parties had not succeeded in reaching an agreement and one of them came back to the Court and stated that the other parties would not negotiate in good faith, I think the Court could have re-exercised its authority. As to your second point, I do not think it would be possible for the Court to go very far in interpreting the word "states" in its present Statute to include non-states. I think it would require an amendment. But amendments are practically out of the question until the Soviet Union changes its mind.



Professor VISHWANATH MORE. What is the prevailing disposition of the members of the International Court of Justice in regard to treating General Assembly resolutions as positive sources of international law?

Mr. GERALD H. GOTTLIEB. I would like to make three points. First, some mention should be made of the critical functions that have been performed by the Court in the last fifty years. Multiple systems of jurisprudence have been able to interact in the persons of the judges, and a body of law built. Second, the Court is a living demonstration of the adjudicability of most major questions, even those which have political aspects to them. Third, it should be mentioned that states are exceedingly reluctant to be judged. There must be a candid recognition of this fact and prods must be found or created so as to bring states to bar, *i.e.*, to cause them to submit to the international courts or to other tribunals.

Judge JESSUP. If I may go back to the question which involved the resort to resolutions of the United Nations as a source of law. The last provision, sub-paragraph d of Article 38, Section 2, permits the Court to resort to judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for the determination of law. The highly qualified publicists are now more and more attributing status of international law to these resolutions. If the Court were so inclined, it could approach the question through this avenue.

Chairman HAMBRO. We shall begin to terminate by asking the members of the panel if they have any final remarks to make.

Dr. GROSS. I would like to make just one comment. It is not really relevant whether one is pessimistic or optimistic as to the future of the Court. We have some hard facts to go by. The Court is not being used very much. Once countries stop going to the Court it becomes a dangerous habit.

My own view is that we have to look at the Statute, a document that is now fifty years old, and see whether it is still adequate to meet the needs of the modern contemporary world. We may find that we need to knock down some of the fences which surround the Court in order to make it more useful.

Mr. FREELAND. I would like to expand briefly on the point about judges of the Court serving in their personal capacity in other judicial bodies. I am sure there is nothing in the Statute or elsewhere to prevent them from doing so, as long as the performance of the outside function does not interfere with the discharge of the function of judge of the Court. I agree with Judge Jessup that if service by judges in outside capacities were to go hand in hand with an increase in the business of the Court itself, there could be nothing but advantage derived from it. My doubt was really about the situation which might arise if the Court came to be regarded as merely—or even primarily—a panel of judges available for service in other capacities such as membership of *ad hoc* tribunals.

Professor ENGEL. I was very glad to learn that Judge Jessup, too, does not seem to consider General Assembly resolutions as new sources of international law but, at best, as contributors to the creation of such law by

entities endowed with law-creating power. The General Assembly, through its unanimous or quasi-unanimous resolutions and declarations, may speed up the development of customary international law ("pressure-cooked" customary law, as I called it, or, better, "instant" customary law, as Professor Cheng has termed it) but it does not create such law itself.

Mr. OWADA. I have one point to comment on and that is the question of lack of confidence. I have some suspicion that this question of lack of confidence is partly used as an excuse for avoiding the possibility of going to the Court on the part of states. I feel that a greater amount of persuasion is also necessary to bring states to the Court. Some form of institutionalization of this element of compulsion might be explored.

There is one final point to which I would like to make reference, and that is the question of cost. In some cases the question of cost in bringing a case to the Court is a consideration. I mention this because at present the choice is not between going to the Court and resort to some forceful means of asserting a claim but between going to the Court and leaving the dispute in a stalemate.

Judge JESSUP. I would just like to add one point on cost. It costs more to submit a case to a small arbitral tribunal than it does to argue the case in the International Court of Justice.

Chairman HAMBRO. On behalf of the panel I would like to thank the audience for their questions and comments which have given us a very stimulating discussion. On behalf of the audience I would like to thank Judge Jessup and the members of the Panel for contributing so generously from their learning, experience, and wisdom. The meeting is adjourned.

#### ROUND TABLE: New Proposals for Increasing the Rôle of International Law in Government Decision-Making

The Round Table convened at 2:15 o'clock p.m. in the Pan American Room of the Statler-Hilton Hotel. Professor ROGER FISHER of Harvard Law School presided.

Professor FISHER observed that the degree to which a government decision reflects a given interest often corresponds to the degree to which a vested lobby exists. Today the environment seems to get short shrift; therefore a special fiduciary group is set up corresponding to this need. In the same manner, farmers did not do too well until the founding of the Department of Agriculture. For his part, the Legal Adviser is primarily house counsel to the Secretary of State. This is a different proposition from his stressing the rôle of law in the long run. (Professor Sohn's rôle is the only one proximate to this.)

Professor LOUIS B. SOHN next spoke about the need to clarify the premises. Is the Legal Adviser in fact equivalent to a house counsel? This is not in fact true, for two reasons. First, the Legal Adviser feels strongly the rôle of impressing the importance of international law on the rest of government, especially the long-term advantage of a system of international law and order. Decision-making is influenced by the Legal Adviser

at all levels, as members of his office work with the regional offices from the very beginning of a crisis. Once the decision is made, however, the Legal Adviser offers his support and puts the best face possible on it just like any other government official. Second, the Legal Adviser's Office has a strong complement of young, competent and dedicated people, who are committed not to power politics but to international law and order. They defend international law and order on a working level. The legal consequences of various contemplated options are given throughout all the consideration of a problem.

In addition, once a decision on an option is made, formulation for the public may involve legal factors. There have been bad results in the past when an option was not phrased in the best legal manner. Legal options under the Charter are especially important here. Sometimes there is great hurry in a rush to make a particular decision and the Legal Adviser is forgotten. This may result in a bad decision, but such cases are rare. It should be remembered that the Legal Adviser and his staff just do not sit in the office and wait; they read the cable traffic and pounce when legal issues crop up.

Professor HANS A. LINDE made a specific proposal to assign a continuing concern with international law to one of the permanent Congressional committees. Within the Executive Branch, legal advice is already extensively institutionalized both in the State Department and in other departments. It is not availability or staffing that is inadequate. What is lacking is an effective source of demand for high-quality executive branch performance in international law, the kind of inhibition on sacrificing legality for policy that courts provide in other fields.

Potentially the profession and other interested members of the public can be a source of this demand, but they lack an organized political forum. Institutionalized surveillance of executive performance in international law can come only from Congress. With a permanent staff and the help of the profession, the appropriate committee or subcommittee could develop its credentials and prestige by on-going work on international law apart from the occasional crisis. It could give attention to the government's international law processes as such, apart from any single issue, on the model of Senator Jackson's Government Operations Subcommittee. It could be the forum for this Society, the American Bar Association, and others to identify areas and problems of international law not getting the right attention in day-to-day policy-making. The committee could proceed by informal meetings and consultations, as, for instance, Senator Ervin's Judiciary Subcommittee on Separation of Powers has done, or it could commission special studies and publications, as well as holding formal hearings when public interest warrants these.

It is wrong to fear such Congressional interest in international law as the intrusions of a hostile or irresponsible critic, as lawyers whose experience has been in the Executive Branch tend to see it. To the contrary, a Congressional committee interested in international law would, no doubt, do most toward the internal beefing-up of international law functions within the Executive Branch.

Finally, we must ask which committee? The Foreign Relations, Judiciary, and Government Operations committees in each house are possibilities, but the Committees on Foreign Relations and Foreign Affairs seem the most logical. There is enough for several subcommittees to do. Ultimately, as everything on the Hill, it is a question of political initiative. When someone discovers an opportunity here for his subcommittee to make a contribution of genuine importance and some prestige value, we shall achieve the needed institutionalization of attention to international law external to the Executive Branch. This Society should help the right committee or subcommittee chairman to that discovery.

Mr. WINSTON LORD introduced his comments with the observation that it should be useful to present a perspective on how the present Administration has organized itself for national security policy. Any foreign policy machinery is dependent on the particular Presidential style and outlook, and the present system is not necessarily or inherently better than in the past. However, it serves this President well. Furthermore, in improving the voice of international law, one could well build on the present system, which is formalized as in the 1950's, but with a clear choice of policy options unlike the general situation in those years. The present machinery also is systematic, with regular meetings and agendas unlike the more *ad hoc*, Tuesday lunch approach of the 1960's.

Mr. LORD then described the present policy machinery and how the international legal perspective is brought to bear. Two types of problems were longer-range policy-making and crises with a short-time fuse. A policy-making problem is taken up in a paper by an inter-agency committee chaired by State's representative in response to a study directive from the National Security Council. The paper then goes up to an Under Secretary level committee chaired by Dr. Kissinger for review. Then follows a Presidential decision either based on National Security Council discussion or a memorandum from the committee. When the President decides, he sends out a memorandum of decision for implementation usually by an inter-agency committee, again chaired by State's representative.

The international lawyer has two rôles: (1) he brings to bear international legal perspectives, among other considerations, on ongoing policy problems, and (2) he helps to carve out new areas of international law.

In the first category the spectrum for the play of legal advice runs from the highly political issues where the legal aspects are less crucial, to more technical ones like that of chemical and biological warfare, to those with heavy legal content like Law of the Sea or with positive international legal opportunities like Southwest Africa or the Honduras-El Salvador dispute. International law can tip the scales where the political, economic, or military considerations and interests are roughly in balance. It can be said that something legal unambiguously, is, other things being equal, more likely to be followed than something illegal unambiguously. Otherwise, it is often a question of putting on the best legal face, or even a fig-leaf. However, in some cases like the Dominican Republic, there was something rather more like a legal see-through blouse than a fig-leaf.

As for the second category, positive enlargement of the rôle of international law, the United States is moving ahead in such areas as outer space and the seabeds. These are instances of moving in with a framework before national conflicts develop. In these areas international law is helping to tie down future conduct and build co-operative habits between nations. In addition, there are the non-ideological areas such as narcotics, hijacking, and pollution where all nations have an interest and a need to co-operate.

As for proposals for the future, no single bureaucratic fix will work magic. What is needed is a series of changes which should have a cumulative impact, upgrading the rôle of international law in foreign policy decision-making. Mr. LORD then briefly discussed the pros and cons of various bureaucratic proposals that had been made over the years. Ideas that seemed unpromising included an Attorney General for International Law and an Assistant to the President for International Law, although this does not mean that there should not be a person on the National Security Council staff responsible for international legal matters. Better ideas would be strengthening the State Department Legal Adviser; sending him to the National Security Council on an *ad hoc* basis; sending him or his representatives to lower-level meetings; creating a specific Congressional subcommittee for international legal affairs; strengthening Professor Sohn's rôle; and strengthening the Advisory Panel for the Legal Adviser, including the contracting out of studies so as to help its busy members.

Mr. THEODORE SORENSEN began his presentation by noting that in the example of Viet-Nam, insufficient attention has been directed to international law considerations by four Administrations. Confining our attention to the U.S. Government, we will note that, by Constitution and history, the President will decide, no matter how systematically bureaucracy may function (under Dr. Kissinger or anyone else). International law will thus not be important until someone representing it gains access to the group of the President's close advisers. Who has this responsibility? Not John Ehrlichman and probably not Dr. Kissinger—he is not a lawyer and has no lawyers on his staff. The same applied to Walt Rostow and McGeorge Bundy. These men have, and have had, the over-all co-ordinating and evaluation responsibility for national security and foreign policy. By definition this responsibility does not devolve on Mr. Helms and probably not on Secretary Laird; they are simply not organized at Defense to come forth with legal solutions. There is, however, less excuse for disability on the part of the Secretary of State and the Attorney General. Yet in fact they rarely have international law slants in their presentations. The U.N. Ambassador would logically be a source, but it is sad but true that this rôle has been downgraded recently. At times, one might expect Congressional leaders to advance international law considerations, but this is not part of their self-image. Each has many other constituencies and responsibilities going beyond international law.

It is clear that the State Department's Legal Adviser and Counselor are not at the situs of decision-making, and the question is how to get someone

responsible present. Inasmuch as a foreign economic policy assistant, equivalent to Kissinger and Ehrlichman, has been deemed necessary, a similar international law aide or at least a top assistant to Dr. Kissinger is needed. More pressure must be exerted, perhaps with Congress as one point of application.

Even if these considerations are met, a system of accountability is still needed though not necessarily in the traditional sense of legal sanctions. Public opinion is a real sanction. The President himself becomes more amenable as election approaches, and an appeal to public opinion in the United States becomes possible.

A special Congressional committee or advisory body reviewing the conformance of governmental action to international law might be possible. Another possibility is a world body, such as the International Court of Justice, the International Commission of Jurists, or the U.N. Secretariat, which could stimulate world opinion and reaction.

Congressman JONATHAN B. BINGHAM noted that a long-run orientation to the rôle of international law reveals that the law's rôle will increase over time if international organizations are strengthened. Ernest Gross has noted the rôle of decisions of the General Assembly in providing standards. In tough and important cases, great skepticism must be exercised in determining just what the law is. People like Dr. Sohn and the Legal Adviser are asked how to do it rather than what to do. As for our skepticism, there is a great deal of latitude of opinion on conclusions at law; for example, Dean Acheson will argue the "other side" of the Rhodesia question. Clear-cut answers to questions are rare.

One is not interested in structural change *per se* so much as in who does what. A relevant subcommittee in the House does not exist now, and they are not disposed to be active. Senator Muskie heads such a Senate subcommittee. Members of Congress participating voluntarily in "Peace through Law," an informal group, may be more effective in pressuring the Administration. This group is divided into subcommittees.

The U.N. Ambassador is ideally situated, but the question comes down to accountability and how to get people in high office with this frame of mind. Who is the Secretary of State, even of Defense? We must push for enlarging the scope of international law with the use of organizations. If there is to be a person in the White House concerned with these matters, he has got to be a person with drive. Above all, we must concentrate on the long-run aspects: strengthening organizations, somehow getting people in Congress and the Executive more sensitive to international law considerations.

Professor SOHN, in summary, noted that the shoe should be on the other foot—*nobody* actually knows what international law is. There is a time squeeze for answers that need to be very hard and precise, based on precedent. Of the last ten years' literature, seventy-five percent is policy-oriented. We have seen very little hard digging, especially on details. When the Cambodia situation arose, only then did we see research on the question of legality of military action by one of the belligerents in

the territory of a neutral nation being used as a basis for attacks by its adversary. The precedent was contained in one footnote in one book.

The young officers and lawyers in the State Department have to decide what the law is quickly. The profession's responsibility is to have more detailed texts available on more subjects. This means the writing of new books. If there were time to check back on a quick decision, one might sometimes find that it was wrong in whole or in part, because no relevant books were available.

Initiating the question and comment period, Professor SAMUEL BLEICHER pointed out that there were three different levels of operation in the Government on international law: day-to-day routine advice, which consumes most of the time and which the government lawyers do best; major initiatives on new substantive rules like the current seabed proposals, which the government lawyers occasionally plunge into; and finally, changes in the legal structure of the international system, which the government lawyers almost never get around to, even though they are potentially the most important. Given the fragility of the current international law system, it is most important that mechanisms be found which will focus more energy and attention on changes in the constitutive elements of the international system.

Professor H. A. I. SUGG spoke to the need for definition of the terms "law" and "politics." In the discussions here the differences between law and politics have been over-emphasized, with "politics" apparently being understood as "power politics," while "law" involves some sort of presumably rational process unrelated to power or to politics. This dichotomizing of law and politics in effect defines law out of the problem of resolving international issues. What needs to be stressed, on the contrary, is the close relation of law and politics as means of resolving international issues.

Professor FISHER interjected that law's formal rôle is the focus, meaning long-term justice rather than short-term victories. The Panel looks for ideas and suggestions as to how to do better or who could do better. He then directed attention to Professor Sohn's defense of the State Department, which he suggested is deficient in generating long-term consideration.

Professor SOHN responded that as an innovation the Nixon Administration established a special job of a planning adviser on international law and world order to the Legal Adviser and through the latter to the President. His task is to implement more successfully a long-range, progressive interest in international law. This is a tall order, and the special adviser must pick only three or four of the possible substantive areas on which to concentrate and stay out of day-to-day crisis decisions.

Mr. SORENSEN interjected with a question to Professor Sohn as to how many times he had visited with the President, the Secretary of State and others to defend a point of view.

Professor SOHN responded that his views were usually transmitted through the Legal Adviser.

Professor THOMAS FRANCK noted that it was a matter of the right man in the right place at the right time and spoke of effective and direct carry-over on the law of resources of the sea. It would be necessary to restrict the operations of the proposed individual and his staff organ to middle and long-range planning, however, while at the same time there should be input into crisis managing. There is procedural input in crises, which are sub-games of a continuing game. The sub-game players should be made aware of the continuing rôles. Professor FRANCK asked Mr. Lord, particularly in regard to Dr. Kissinger's function, who did this.

Mr. LORD responded that this was done by various officers but that presently there was not a full-fledged assistant who was responsible only for legal matters. He thought this would be a good idea.

Congressman BINGHAM interjected that the focus should not be what is international law in this or that case but what is the general impact.

Professor RICHARD BILDER emphasized the importance of bringing governments to an awareness that international law was not juxtaposed to national interest, but instead frequently crystallized long-run national interest considerations in rational world order arrangements.

Mr. JOHN SURR of the International Monetary Fund, speaking in his personal capacity, commented that the United States, like other governments, has many international obligations of a routine or technical nature which government agencies may ignore or find obsolete and burdensome. The climate of compliance with international law could be improved if, for instance, an academic group could re-examine the treaties in force to "weed out the underbrush" and call to the attention of the appropriate agencies those obligations which might be violated inadvertently.

Mr. BENJAMIN FORMAN declared that he had perceived an underplaying of the lawyer's rôle in past crises. In his opinion, the sixty-five State Department lawyers and twenty-five in the office of the Secretary of Defense did not play a significant rôle in long-range planning. He then asked Mr. Lord how many National Security Study Memoranda and Under Secretaries Committee Study Memoranda were presently staffed and under consideration. When Mr. Lord replied twenty-five, Mr. FORMAN indicated that he would have thought more, and asked if all had been seen by a lawyer.

Mr. LORD replied yes, in certain aspects at least. He added that there were more than 25 NSSM's and USM's in the system at present, but that he thought about 25 were really active.

Mr. FORMAN asked who decides.

Mr. LORD replied that not every National Security Study Memorandum written has legal aspects but that there is an implications checkoff procedure, and he did think international legal aspects were covered. When a paper reached the Assistant Secretary level, a legal adviser had seen all relevant parts. Perhaps it was advisable to put this specifically in the study directives, even if the result were to amount to no more than a one-sentence presentation. A lawyer should be at any meeting with clear legal implications.



Professor FISHER asked Mr. Forman if indeed he was suggesting that lawyers should get a crack generally at National Security Study Memoranda.

Mr. FORMAN replied that he was making no proposal but believed that more of these papers could be staffed with the lawyers.

Professor SOHN identified three different problems. The legal input at the outset of framing the question was a crucial problem. Although the Office is not there at the White House drafting, often they wished they were. If the White House does not know of the legal problems involved, a wrong question might be asked. Second, the Legal Adviser's Office participates in the preparation of replies. Third, once the decision is made, the Office helps in implementing and explaining it.

Mr. LORD added that when a directive was prepared one could make good use of a legal assistant on the National Security Council staff.

Mr. FORMAN then asked Professor Sohn if he could use ten people on his staff.

Professor SOHN responded yes, provided they were sufficiently high-caliber. One needs age and background to spot problems and issues. These are so complex that it is physically impossible for one man to monitor them. He had to reject arms control, a cause dear to his heart, from his own considerations. In addition, more than one viewpoint is advantageous. The problem at the Office of the Legal Adviser should be seen in historical perspective. The Attorney General was originally the chief international law officer and wrote opinions. This rôle completely disappeared later. Then came various Solicitors at the State Department, an Assistant Legal Adviser and then a Legal Adviser, eventually given the rank of assistant secretary. Parallel to Moore's notion of upgrading the office to Under Secretary level, the Legal Adviser could be put in the National Security Council either permanently or for certain cases.

The CHAIRMAN thereupon declared the meeting adjourned.

#### **ROUND TABLE: The Dilemma of Foreign Investment in South Africa**

(Sponsored jointly with the Association of Student International Law Societies)

The Round Table convened at 2:15 o'clock p.m. in the Congressional Room of the Statler-Hilton Hotel, Douglas P. Wachholz, President of the Association of Student International Law Societies, presiding.

The CHAIRMAN opened the discussion by welcoming the participants and members of the audience on behalf of the Association of Student International Law Societies and the American Society of International Law. He noted that there is a heightening of interest in foreign trade and investment in South Africa, both in the United States and abroad. The CHAIRMAN felt that it was most unfortunate that members of the American business community who trade and invest in South Africa would not participate in the Round Table. He said that he had invited a great many persons, all of whom had declined to participate.

The CHAIRMAN introduced as the first speaker Mr. Joel Carlson. Mr. Carlson, who formerly was an attorney in Johannesburg, has recently renounced his South African citizenship.

## THE DILEMMA OF FOREIGN INVESTMENT IN SOUTH AFRICA

*By Joel Carlson \**

As the first speaker on this panel it is necessary to place squarely to you what the real dilemma is for any good man who asks the questions: Should I invest in South Africa? Should I continue my investment in South Africa? If the question only concerns the profitability of the undertaking, no more need be said. There are few areas where more profit out of cheap labor can be made; so obviously, for a profiteer, in profit terms, the answer is simply "Yes." But I am not concerned with such exploiters.

Today the answer is not gained without an examination of the framework of South Africa. In 1961 South Africa became a Republic. It is governed by a Parliament of 166 members, all white, elected by white voters in South Africa and South West Africa—Namibia. The latest population of this area is just below 22,000,000. The voters on the roll number 2,028,000. In 1971, 1,495,000 voters voted for the 4 white parties. 96.5% of this electorate voted for *apartheid* or white supremacist rule. 3.5% voted for a few moderate changes within the framework and returned one moderate conservative politician more on her personality than her party's platform. The whole electorate wish the *status quo* maintained, but differ in details of the application of white rule.

White rule is enshrined not only in the Republican Constitution, but race classification is part and parcel of the law and framework of society. Every person born, alive and dead, is classified. Blacks are classified further according to race, tribal origin, place of residence, fingerprints, etc. Even voting rights and a voting record are to be kept. The delay in implementing all this is that the Government has yet to computerize it. I do not know whether the computer will be supplied by English, French or American firms.

The residence and regimentation of Blacks as migrant labor units is enforced by Pass Laws. Pass Laws make crimes of a unique kind—crime relating to skin color, crimes committed only by Blacks. Over a ten-year period, 8,000,000 out of the 15,000,000 Black population have been arrested and jailed under the Pass Laws. Every day, 365 days a year, an average of 2,500 Africans are arrested under the Pass Laws and brought to an average two-minute hearing of their trial in court. The yearly total is at least 750,000.

The daily average prison population on latest figures is 90,555. In Britain it is 38,000. Britain's population is 55,000,000; South Africa's is

\* Senior Fellow, Center for International Studies, New York University.

22,000,000. In 1969, 4,000 mothers with babies were admitted to prison—African mothers as Pass Law offenders. 25,000 lashes are inflicted as corporal punishment; 24,663 on Blacks. 47% of the world's hangings take place in South Africa, which for years has held the world's record in hanging people. 455 policemen have been convicted of assault in South Africa for one, two, three or four convictions and every one of them retained in the police force. In Britain, seven policemen out of 96,000 were convicted for assault over the same period and all seven dismissed.

Punishment without trial, arbitrary arrest, and detention are an everyday occurrence. That people should be punished without charge or trial is repugnant to all men in civilized societies. In South Africa it is necessary to uphold the society and an essential part of the framework. 1,000 people have been banned, house-arrested, banished without any charge or trial. After people have been punished by courts or acquitted by courts the Security Police still revenge themselves on these people, ban them, harass and intimidate them and try to destroy their morale. 17 people have died while under restriction.

Indefinite detention in solitary confinement incommunicado is imposed at the discretion of the Security Police. Detainees are questioned interminably and subjected to torture; torture made impossible to prove by the cleverness of the Security Police and the assistance of the Ministers who condone it. At least 14 people have died in detention and maybe 18. It has been said by authority that seven of them hanged themselves while police have said of the other deaths that "they slipped on a piece of soap," "fell down stairs," "slipped in the showers," and one we know jumped from the seventh-floor window of his interrogation room. There are presently at least 25 and probably 100 people in such detention in South Africa today; the exact number has not been released; such information is kept secret.

In the richest land in Africa with a storehouse of mineral wealth making it a land of great promise, what have 50 years of economic development and growth achieved? In its great mining and industrial enterprise, what is the record? In 1969 in mining, Whites received an average income per month of \$416. Black miners earned an average \$25.20. In 1969 in commerce, the same figures are Whites \$364 per month, Blacks, \$66. In industry, in mining, in commerce, all show the poverty gap widening—the Whites getting richer, the Blacks poorer. Most Blacks live below the breadline today. All figures indicate an increasing deterioration of the position. Whatever the arguments that economic development brings about improvement, the facts show the reverse to be the case.

In health, infant mortality for Africans is shown as 124 per 1,000; Coloreds, 132 per 1,000; Whites, 21.2 per 1,000. Kwashiorkor, a malnutrition disease, showed a 600% increase over a four-year period in Port Elizabeth, where General Motors is established. In the neighboring Bantustan of the Transkei, 40% of all African children die of Kwashiorkor before reaching the age of 10. In some areas of the Transkei the incidence of tuberculosis is 20% of the population, and health officers say that poverty and

the disruption of family life caused by the migratory labor system are major elements in this high incidence of T.B.

And so on and on. This is the framework in which all investors must work and have worked. After all our development this is the picture in 1970 after increases in the amount of foreign investment. After the increases, the position in South Africa deteriorated for the Blacks.

The Blacks, however, will not forever be without a voice and without power. The White South Africans can strive to keep the Blacks down and keep the structure a white supremacist one. Every investor has a stake in keeping the structure white. In order to make his profit he must support the structure, even improve its efficiency. The African sees this. The African in South Africa recognizes it. The African outside South Africa recognizes it and, of course, a change will come. The partnership of the White South African and the foreign investors will be recognized for what it is, a partnership inevitably resulting in the suppression of the Blacks in their struggle in South Africa for legitimate rights. The foreign investors will therefore have a vested interest in the alienation of the rights of Africans in South Africa. They will lose the sympathy of Blacks everywhere. They will have to pay the price for such alienation and they may find that the profit now enjoyed by them is not worth the price.

The CHAIRMAN then introduced Mr. Pierce Newton-King, a South African attorney and a member of the American Society of International Law.

### REMARKS OF PIERCE NEWTON-KING \*

Mr. NEWTON-KING stated that he did not come to the discussion to explain the system of *apartheid*. His law society asked that he come to speak on investment in South Africa. He appreciated that members of the American Society of International Law were concerned with human rights as were many South Africans of all political persuasions. He pointed out, however, that not even the United States had been able to accept the Universal Declaration of Human Rights in its entirety.

Mr. NEWTON-KING said that some of Mr. Carlson's statistics were evidence only that South Africa shares with much of the rest of Africa the ever present problem of poverty and a substantial population living outside the cash economy. He was optimistic that South Africans would arrive at a solution of their problems, whether or not pressure is applied by the world community, but the withdrawal of American investment would not solve the problem, it would only make it harder to maintain an upward spiral for black South Africans out of a basic poverty. It had been estimated that something like 200,000 jobs would have to be found every year for black South Africans entering the labor market and nothing should be done to make this target harder to achieve. Mr. NEWTON-KING believed that American and foreign companies investing in South Africa had made a real contribution to the standard of living of all

\* Attorney, Johannesburg, South Africa.

South Africa's people and they could be encouraged to expand and continue this contribution in an enlightened manner.

Finally Mr. NEWTON-KING welcomed the current awareness of the need for business to play a constructive part in the future of South Africa and considered that the publicity given to the program adopted by the Polaroid Corporation had on balance been helpful in setting a standard for enlightened employers, both South African and foreign.

The CHAIRMAN introduced Robert S. Smith, Deputy Assistant Secretary of State for African Affairs.

## THE DILEMMA OF FOREIGN INVESTMENT IN SOUTH AFRICA

*By Robert S. Smith \**

I wish to begin by stating that I am second to no one in my contempt for a legal system which so blatantly discriminates against so many people, purely on the grounds of skin color and racial origin as does the Republic of South Africa's system of *apartheid*. I share with most of you the profound hope for change in this system, change to equal rights and equal opportunities for all. Nevertheless, I am equally convinced that the ability of the government and people of *this* country, or of any other country outside of the Republic, to bring about a change in this system is limited. Further, I do not believe that violence or boycott is a desirable or even potentially successful way to do so.

It is the view of the Government of the United States that the best policy we can adopt at this time toward the Republic of South Africa, while making our stand against *apartheid* absolutely clear, is to maintain and increase communication with all of the people of South Africa: communication intended to maintain human contact with non-white South Africans and to persuade and ultimately convince white South Africans that change, which can best come from within, is both necessary and inevitable.

The object of a policy of communication is not retaliation, punishment or clearing our own consciences, but peaceful change. We continue to make clear our abhorrence of *apartheid*. We continue to ban the shipment of any military equipment to South Africa. We want no part of the system of force by which *apartheid* is being maintained. At the same time, we reject the use of military force to overthrow the system. Given the power of the South African Government, attempts at violent overthrow could be disastrous. We believe that most of the non-whites in South Africa would strongly prefer non-violent change. We know that most Americans are fed up with fighting in distant lands; recent and current demonstrations in this city are a clear signal of that.

We also oppose a general boycott. We do not believe that a government policy of economic and other isolation of South Africa would serve the goals

\* Deputy Assistant Secretary of State for African Affairs.

we seek. This would require a vast international effort, including naval blockade and, in the modern world, would be nearly impossible to achieve; this attempt at isolation, we also believe, is not desired by the vast majority of non-whites in South Africa.

What are the merits of a policy of communication? We believe it reduces the ignorance of the outside world shared by so many South Africans, white and non-white, as well as the lack of knowledge among outsiders about the South Africans, white and non-white. Secondly, we believe such a policy tests the South African system in a way that the South African Government has been asking to be tested by its calls for meetings with black African diplomats; its encouragement of European and American tourism; and its desire to maintain relationships in international sports competition, even to the point of recently announcing some bending of *apartheid* rules. Thirdly, it encourages—even obliges—white South Africans to ask themselves about their policies. And fourthly, a policy of communication seizes upon the possibility of peaceful change, rather than rejecting it through violence or enforced isolation.

How does a policy of "communication for change" relate to U.S. private investment in South Africa? There is no doubt that foreign investment strengthens the regime and, to some extent, supports its racial policies: It provides revenues; it increases productive capacity; it stimulates the economy; it constitutes foreign involvement in and co-operation with the system; it is a psychologically significant symbol of outside acceptance.

At the same time foreign investment can be a force for change, in that it adds to the economic pressures to bring more non-whites into the labor force and at increasingly higher levels; it increases communication with the outside world, through foreign businessmen and technicians; it provides an opportunity to inject enlightened employment policies to improve the well-being and opportunities for non-whites; it is a channel through which outside influences can be felt, as we have recently seen in the case of Polaroid.

What about purely business considerations involved?

Business in and with South Africa is certainly profitable. Much American investment there goes back many years. In 1969 there was a return of about 14% on U.S. manufacturing investment in South Africa. U.S. exports to South Africa in 1970 were worth \$563 million. Together, these represented one fourth of our investments and one third of our exports to the whole of Africa. Our imports from South Africa include major sources of important minerals, such as gold, platinum, industrial diamonds, antimony, chromite and uranium. At the same time, Americans doing business in South Africa are beginning to come under serious criticism from diverse groups in this country, in Africa and in major international bodies. Church, labor, university and racial minority groups have been challenging American investors. Polaroid, General Motors and Gulf are particular targets. In the past few months about twenty major American companies have sent their representatives to talk to us in the State Department about the future of their investments in South Africa.

What is U.S. Government policy toward investment in South Africa? We neither encourage nor discourage American investment in the Republic itself. Direct Export-Import Bank loans are not available for this purpose. Restrictions on U.S. investment in developed countries apply to South Africa. The United States Government does not participate in trade fairs and exhibits in the Republic. The Department of Commerce makes the facts of investment available upon request, including facts about the racially discriminatory labor laws and associated deterrents to investment. Where investment occurs, we seek to encourage enlightened employment practices by American firms.

Our policy toward Southwest Africa, the League of Nations Mandate territory that the Republic continues illegally to maintain, is a different matter. It is as a result of this illegality that President Nixon announced last May that we would actively discourage investment in the territory; that we would deny *all* Export-Import Bank facilities for trade and investment in the territory; and that we would deny U.S. Government assistance for the protection of investments, made on the basis of rights acquired since the U.N. General Assembly revoked South Africa's Mandate in 1966, from claims of a future lawful government.

What are the choices available to American investors?

A. *Withdrawal.* We understand the point of view of those investors who would withdraw, and recognize that the South Africans would be distressed if a firm should take that step. However, we do not believe a general American policy of withdrawal would be an effective blow to *apartheid*. To implement such a policy would probably require legislation and we have little reason to believe that other industrialized nations would follow suit. In fact, they would be much more likely to fill the gap—an investment which only represents 15% of direct foreign investment in South Africa. General withdrawal would have moral value, but it would probably harden the resolve of the South African Government to maintain its present system, reduce opportunities for the communication for change of which I have been speaking, and probably not upset the economy of South Africa.

B. *No New Investment.* Similar considerations apply to this choice.

C. *Increased Investment.* We do not discourage U.S. firms from investing because we believe U.S. firms can exercise an influence for good, even within the system.

D. *Enlightened Employment Practices by American Firms.* We believe that much can be done, within the laws of South Africa, to improve salaries, increase worker education and training, provide health and welfare benefits, including educational assistance to children of workers, and generally improve working and living conditions and opportunities for non-white labor. Such practices are already carried out by a number of South African firms, as well as by certain American firms. An extension of enlightened employment practices is consistent with communications for change and may significantly ameliorate labor conditions and thus provide some of the ingredients for more fundamental changes in the *apartheid* system.

I am well aware that such a "gradualist" approach will not satisfy many outspoken critics of *apartheid*. But I believe that many critics would be willing to reconsider their positions if there were evidence that American business was having a favorable impact on the South African situation.

E. *Investment in Black Africa.* An additional opportunity is the expansion of American investment in the majority-ruled states of Africa. Already half of American private investment on the Continent of Africa is in Black Africa, and it is growing at a higher rate than U.S. investment in South Africa. We definitely encourage this development. It demonstrates our support for the economic development of one of the least developed continents in the world, a continent which offers rich mineral resources, and growing agro-business, industrial and tourist possibilities. It also reflects our preference for countries which do not have a legally imposed system of racial discrimination.

The successful development of black Africa cannot but have influence on the racial attitudes and theories of South Africans. Particularly significant is investment in the non-racial states of Botswana, Lesotho and Swaziland, land islands in the South African sea. Investment in these three very poor nations offers the benefits of investment in the other Black African states as well as the commercial advantages of participation in the Southern African customs union and *rand* currency zone, and is directly visible in South Africa itself.

To conclude: While foreign investment, including American investment, has helped South Africa's economy to grow, we are not persuaded that general withdrawal of this investment or stopping all new investment would cause South Africa to abandon its policy of *apartheid*.

We neither encourage nor discourage new investment in South Africa. Such investment as there is can, if properly managed, contribute to peaceful and constructive change in South Africa. At a minimum, this requires enlightened employment practices within the limits of South African law. And American commercial interests located in South Africa can provide channels of contact needed to bring home to the South Africans the realities of the world around them.

The CHAIRMAN introduced the Honorable Charles C. Diggs, Jr., Representative from Michigan and Chairman of the Subcommittee on Africa of the House Foreign Affairs Committee.

## REMARKS OF THE HONORABLE CHARLES C. DIGGS, JR.\*

In 1970 a group of concerned black employees at the Polaroid Corporation's headquarters in Cambridge, Massachusetts, formed the Polaroid Revolutionary Workers Movement to protest the company's economic involvement in South Africa, particularly the company's preparation of the

\* Member of Congress from Michigan.



passes that Black South Africans are required to carry under the *apartheid* regime's identification system. These employees exerted enough pressure that in January of this year, Polaroid ended its connections with the South African Government's ID system, but announced that it would continue its other business operations there, then stating the Polaroid approach, which has become symbolic of the rationale of U.S. businessmen in South Africa. It is, in brief: that Polaroid will carry on in South Africa and use its influence to raise the salaries of non-white employees for important jobs in the companies of its business associates.

This is not a new argument for U.S. investment in South Africa; a good number of the 300 U.S. companies in South Africa have used this rationale in some form for years. But in the past 20 years during which the *apartheid* regime has been in power and during which this rationale developed, no progress in reforming *apartheid* has been made. This rationale is based on three faulty assumptions: one, that U.S. business investments in South Africa are free of political implications; two, that the industries, despite laws, can influence the population's standards of living; and three, that changes *can* be made in South African law so that African wages can be raised, better jobs opened and *apartheid* eventually undermined and destroyed.

It is erroneous to believe that there are no political implications in U.S. business involvements in South Africa. Their involvements not only promote the present self-reliance of the present power structure and the *apartheid* system, but they also contribute to increased disenchantment of black Americans and black Africans with the sincerity of U.S. denunciations of *apartheid*.

Although U.S. interests in South Africa are small by U.S. standards (accounting for only 1 percent of total American foreign investment), they are substantial by South African standards (accounting for 13 percent of total foreign investment in South Africa). American investments, now totaling \$800 million in South Africa, directly help to strengthen South Africa's *apartheid* regime because these investments are concentrated in the critical sectors of that country's economy—heavy industry, military production and mining. These investments in automobile plants, mining, banking, and oil installation and explorations (involving such giants as General Motors, Ford, Chrysler, Gulf, Standard Oil) are helping South Africa to maintain self-sufficiency to be a nation, upon which United Nations sanctions can have no effect.

U.S. companies produce 60 percent of South Africa's cars and trucks. The presence of the American auto industry there is a potential aid for the military defense of that country. The *apartheid*-supporting Nationalist Party newspaper said in June, 1966, regarding GM and Ford: "... and in times of emergency or war, each could be turned over rapidly to the production of weapons or other strategic requirements."

But more important than the size of the U.S. investment there is the degree to which American participation in that economy reassures white supporters of *apartheid* that they can continue to look for support from

the West. U.S. investments help to maintain ties between the Republic and the Western world; white South Africans fear nothing quite so much as possible isolation from the West. Although that country's leadership is always upset by Western governmental criticisms of *apartheid*, these worry them less than the input or output of Western financial and technical resources.

Further, these U.S. investments, especially when compared to the meager U.S. investments in other African countries, cause the opponents of *apartheid*, especially non-whites, to look upon the U.S. and other Western countries as supporters of *apartheid* and therefore as enemies. At a crucially formative time in the history of Africa, these U.S. investments are contributing toward anti-U.S. attitudes.

The second assumption, that U.S. investors can influence the blacks' standard of living despite limitations of South African laws, is also fallacious. U.S. investors argue that, in the short term, the application of modern methods of technological development via U.S. business investments can directly contribute toward improving wages and training of Africans. But because Africans are not allowed to form free labor unions; enter freely into wage-bargaining or even into certain levels of employment, American firms, in fact, have very little to say over what the basic conditions of Africans' work and life are in industry. Wages in American-controlled plants are seldom higher than those paid by locally controlled plants, and in the mining industry, the wage structure of American companies is among the lowest.

The status of Africans—within-industry training, apprenticeships, and categories of employment—are defined by South African law, over which foreign industrialists have little, if any influence.

The assumption that changes can be made in South African law to reform and eventually eliminate *apartheid* has been offered as a justification by industrialists for some time. But the events of the last 20 years have proven this also false. Only the reverse is true. Since 1950, two years after the architect of *apartheid* came to power, U.S. investments in South Africa have increased from \$148 million to \$800 million. Yet during the period between 1957 and 1967, non-whites lost their last representation in Parliament; black opposition parties, press and leadership were banned; laws were enacted permitting the arrest and punishment of these people without charges, trials or appeals; laws were also enacted which broke up black families and forcibly removed thousands of Africans from areas designated "White" to tribal areas; and the gulf between the average wages of white and African workers in the manufacturing industry increased from \$168 to \$281 a month.

It should be remembered that South Africa has an ideological regime based on *apartheid*, and that this regime ignores sound economic practices as well as humanitarian considerations when these factors clash with continuation of a rigid enforcement of *apartheid*.

Supporters of American investment there have argued that 20 years is too short a time in which to judge the results of industrial involvement

there, but in so doing they demonstrate their ignorance or indifference to the lesson taught by other countries, including the United States. Americans need not be reminded that huge industrial expansion is insufficient by itself to alter basic political and social conditions. In this country, for example, even with the Constitution on the side of equality, the great economic growth of the last century failed to change the fundamental political condition of the negro population. In light of this, how can industrialists hope to effect social and political changes in the vastly more complex racial problems of South Africa, where the laws, unlike those in the United States, seek to entrench racial separation and inequality?

It is a dangerous illusion to believe that change through expansion in South Africa is possible. This theory is no more than a misleading rationalization of industry to justify what is in its best economic interests; and with profits of 20 to 25 percent in South Africa, their interests are substantial.

In respect to the growing interest of black Americans in South Africa-U.S. relations, and the growing disillusionment of black Africans with our involvements in South Africa, it is vital that this Government develop disincentives to private American investments in South Africa and to encourage increased U.S. business investments in other parts of Africa. In a warning to this country about where our business involvements in South Africa may eventually lead, a former State Department and Ford Foundation official (Waldemar Nielson) remarked: "Make no mistake about it. The issues of southern Africa, once the Viet-Nam agony is finished, are going to be the next foreign policy focus of the moral indignation of youth, the American negroes, and the American left."

The CHAIRMAN then introduced Julius Duru of the University of Denver Law School.

## THE DILEMMA OF FOREIGN INVESTMENT IN SOUTH AFRICA

*By Julius O. Duru \**

South Africa is not a myth; it is a reality. The history of the white settlement in South Africa began in 1625, when the first batch of Dutch people were brought in by the Dutch East India Company. In 1795 the British captured the Dutch settlement at Cape Colony, thus planting the British stock. In 1860, because of labor shortages in the sugar plantations in Natal, the British brought in a few Asiatic Indians to meet the labor demand. The Africans went about their business as usual, raising their cattle and farming the land. Sexual intercourse was popular among the races, thus giving rise to the fourth race in South Africa, the Coloreds. According to the 1970 census figures,<sup>1</sup> there are about 4 million whites

\* University of Denver Law School.

<sup>1</sup> Republic of South Africa, Bulletin of Statistics; House of Assembly Debates (Hansard), Sept. 25, 1970, col. 5132.

(Afrikaans), 2 million coloreds, half a million Asians and last, but not the least, 15 million Africans. Today South Africa is still led by the 4 million whites, who usurped the power and lord it over the majority of the population who are non-white. The doctrine of *apartheid* as practiced by the Government of South Africa was clearly defined by a statement by the late Prime Minister of South Africa, Dr. Hendrik Verwoerd. He stated: "We want to keep South Africa White . . . 'Keeping it White' can only mean one thing, namely, White dominance, not 'leadership,' not 'guidance' but 'control,' 'supremacy.'" <sup>2</sup>

White supremacy in South Africa, otherwise known as black subjugation and black slavery in South Africa, has continued over the years only because of the economic and moral support given to it by foreign investors in South Africa. The South African Government policy of *apartheid* assures the investor of cheap labor, rapid expansion and high returns. There is a direct relationship between investment, profit and *apartheid* in South Africa. The higher the investment the greater the profit made by the investor and the more the dehumanizing of the African through more *apartheid* legislation or more strict enforcement of the existing *apartheid* laws.

In 1956, foreign investment in South Africa was R 2,790 million,\* average rate of return was less than 9%, the number of executions about 8 and the daily prison population less than 50,000. In 1965, total foreign investment increased to R 3,471 million, average rate of return was slightly more than 10%, the number of executions rose to more than 20 and the daily prison population rose to 73,000. By the end of 1969, total foreign investment in South Africa was R 4,990 million, the average rate of return was more than 16%, the number of executions was 118 people (1968) and the daily prison population was more than 88,000 people. In the same peak year (1969) more than 1,900 persons were prosecuted daily for pass offenses.<sup>3</sup> It is needless to say that non-whites make up about 99.99% of the prison population and also those executed.

There are more than 375 United States companies that have investments in South Africa.<sup>4</sup> The key companies include the following: General Motors, Ford, Chrysler, Kaiser Jeep, Firestone, Goodyear Tire and Rubber, Union Carbide, U.S. Steel, Charles Engelhard,<sup>5</sup> Chase Manhattan Bank,

<sup>2</sup> G. Legge, C. Pratt, R. Williams and H. Windsor, *The Black Paper: An Alternative Policy for Canada toward Southern Africa*, The Committee for a Just Canadian Policy Toward Africa, Toronto, Canada, 1970.

\* 1 Rand is equivalent to U.S. \$1.40.

<sup>3</sup> The figures and percentages used in this analysis were obtained from the following publications: UN/No. 7/71 Ab. 1971 (71-03654); ST/PSCA/Ser. A/10.

<sup>4</sup> Blyden B. Jackson, "Apartheid and Imperialism—A Study of U.S. Corporate Involvement in South Africa," *Africa Today*, Vol. 17(5), 1970.

<sup>5</sup> Mr. Charles Engelhard is a very well-known American citizen in Africa. He is Chairman and Director of Engelhard Minerals and Chemical Corp. (EMC) which is the world's largest refiner and fabricator of precious metals. He is the only American who serves as an Officer and Trustee of the South African Foundation (a South African propaganda organization). He is on the Board of the Witwatersrand Native Labour Association and the Native Recruiting Corporation, two of the official agencies

First National City Bank, Chemical Bank, Standard Oil of California and Texaco (Caltex), Mobil and Standard Oil of New Jersey (Esso).<sup>6</sup> Because of these investments from the developed nations—U.S.A., Britain, West Germany, France, Japan,<sup>7</sup> etc., South Africa has been encouraged to defy and continue to defy all the resolutions of the United Nations requiring it to abandon its racist policies.<sup>8</sup> The events in South Africa pose a great threat to world peace and security (S/RES/282, 1970). Most of the independent African nations are gravely concerned about the condition of the Africans in South Africa and the tacit approval of the major Powers of the South African regime (*cf.* Lusaka Declarations, United Nations Note Verbale NV/209, Nov. 12, 1970).<sup>9</sup>

It becomes very clear that there is no hope that South Africa will change its *apartheid* policies on its own. There are many partners in the "game." To achieve a change in the South African racist policy, we must start from the grass roots—the investors. The foreign investors fan the fire that burn the Africans in South Africa. It is very encouraging to observe the American public awoken to the problems in South Africa. The shareholders of General Motors Corporation, through the excellent leadership of Dr. Leon H. Sullivan (who is on the Board of Directors of GM) will be casting their vote on May 21, 1971, asking GM to completely liquidate and withdraw its operations in South Africa.<sup>10</sup> Their main reason for taking such a move was supplied to them by the Chairman of the GM Corporation, Mr. Roche, who said that "apartheid creates an extreme risk of eventual turmoil and instability in South Africa, which makes investment there excessively risky."<sup>11</sup> This is an acknowledgment of the fact that the situation in South Africa will no longer continue to be a topic of intellectual round-table discussion; physical confrontation is probably imminent. The highly sophisticated establishments of General Motors, Ford, Chrysler, etc., in South Africa are very easily converted into factories for the manufacture of war materials. President Kaunda once said that when the South African confrontation arrives, it will make the Viet-Nam war look like a child's picnic. In order to prevent such prophecies from happening, it becomes imperative for you and me to support such movements as that of Dr. Sullivan, the Polaroid Revolutionary Workers Movement (PRWM) and a few others, that are interested in the preservation of the human race and the restoration of the human dignity.

Another area of consideration is on the effect of South African gold

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that recruit Africans from Mozambique and Zimbabwe as cheap labor for the mines. He has been a generous financial contributor to the Democratic Party and has represented the United States Government in many international events. Blyden B. Jackson, cited note 4 above, pp. 26-28.

<sup>6</sup> A complete list of these companies can be obtained from the American Committee on Africa, 164 Madison Avenue, New York, N. Y. 10016.

<sup>7</sup> U.N. Doc. A/AC. 115/L. 292 (March 19, 1971).

<sup>8</sup> See U.N. Resolutions: 181 (1963) of Aug. 7, 1963; 182 (1963) of Dec. 4, 1963; 191 (1964) of June 18, 1964; and 282 (1970) of July 23, 1970, S/RES/282 (1970).

<sup>9</sup> 10 Int. Legal Materials 215 (1971).

<sup>10</sup> E. N. Cole (President), General Motors Corporation. Letter to Stockholders, April 5, 1971.

<sup>11</sup> *Ibid.* 40.

monopoly. South Africa imports large capital equipment and exports very little. The difference is by a factor of 10, thus resulting in a deficit of almost one-half billion dollars.<sup>12</sup> Therefore, if we exclude gold from South Africa's export, there is no way in the world that the South African economy will survive. South Africa recognizes this more than we are aware of, and as such has taken bold steps to preserve the world demand on gold. Recently, the International Monetary Fund (IMF) entered into an agreement with the South African Government for the purchase of South African gold. The agreement in part states that

under this policy, South Africa may offer to sell gold to the Fund when the market price of gold falls to \$35 per fine ounce or below, in amounts necessary to meet current foreign exchange needs during any such period. Further, South Africa may sell gold to the Fund, regardless of the price in the private market, to the extent that South Africa has a need for foreign exchange. . . .<sup>13</sup>

No other country has such an assurance for international exchange. This is what attracts investors to South Africa. They do not face any danger of currency inconvertibility which is a danger facing any other investor in most parts of the world.

Why should South Africa be disturbed by the U.N. resolutions and world opinion against *apartheid*, when the United Nations and the world economy depend on South Africa for the existence of world trade and finances? The United Nations should seriously consider the development of world currency backed by something other than gold. I am not an economist; therefore I cannot offer a more definite suggestion on this idea of world currency. There is no doubt in my mind that the Government of South Africa will be extremely vulnerable to such a change. The gold method of international monetary exchange has been found to be outmoded and the South Africa issue offers another great reason why we should drop the gold exchange system.

The CHAIRMAN introduced John N. Brander of the Georgetown University Law Center.

## THE DILEMMA OF FOREIGN INVESTMENT IN SOUTH AFRICA

By John N. Brander \*

America's trade with South Africa is small. From America's point of view it is very small. Apart from gold, diamonds and herring, what else do we need from there? What we have to sell can be sold elsewhere just as easily. If we consider the matter of trade in this light, it is like looking

<sup>12</sup> Rodney J. Morrison, "Apartheid and International Monetary Reform," 32 R. Pol. 338-346 (1970).

<sup>13</sup> International Monetary Fund Arrangement to purchase South African Gold. I.M.F. International Financial News Survey, Vol. XXII, No. 1 (Jan. 9, 1970), and *ibid.*, No. 2 (Jan. 16, 1970).

\* Georgetown University Law Center.

through the wrong end of a telescope. Looking at the volume and value of our trade with South Africa from South Africa's point of view, the amount of trade is significant. The same can be said for our investment. Our investment in South Africa is small when compared with our total investment. From South Africa's point of view the percentage of U.S. investment as compared with total foreign investment is much greater. A withdrawal of investment by American businessmen and industrialists would have some effect on South Africa. The effect would be adverse. Probably the South African Government would like to see American investment withdrawn. Certainly many South Africans I know would favor such withdrawal. Yet the effect on the South African economy would be to slow the growth rate and in turn lower the standard of living. This Panel is called together to consider the pros and cons of such a withdrawal of U.S. investment. My position is against such withdrawal.

## I

I believe that trade and politics are mixed up together to some extent. To support American investment in South Africa cannot help meaning an acquiescence in the political *status quo* or actual approval of its governmental policy. It has always been a policy of the United States to favor, if not encourage, free trade and investment abroad. Traditionally, if one person wanted something another person had and that other person wanted something you had, you traded with each other. It did not matter whether you liked that other person. What was important was whether you trusted him, and he you. If you did not, you either didn't have business relations with him for very long or else you had a fight of some sort. If there was trust between you, you kept on trading. The same sort of things can be said of nations. Nations are neither moral nor immoral. Every nation is motivated by desires of self-interest. If it served this nation's interest to have dealings with another nation, we had dealings. If not, we didn't. What influenced the United States to have such dealings was whether the other nation had something we wanted, whether we could supply something to them they wanted, whether they honored their international obligations, whether our basic strategic interests did not clash with theirs and whether theirs did not clash with ours. Our relations with Cuba and Communist China are classic examples of this in recent years. This should also be a guiding principle in considering whether our Government should advise investors in South Africa to withdraw their investments or not. Such a consideration prompts me to answer this question in favor of retaining our investments in that country.

## II

The internal position in South Africa is unlikely to change for a while yet. Perhaps there will be a general uprising against the white man by the Bantu as some people forecast. I doubt it, at least in my lifetime. What I see as happening eventually in South Africa is that some peaceful resolution will take place. I hope the resolution will be a just one, but it will be a new

form of society that we cannot imagine at the moment where the various racial groups will live together in harmony in the same geographical area. At the moment the ruling white minority is insecure. This insecurity is not likely to disappear overnight. The truth is that for nearly four million white people in South Africa there is nowhere else in the world they can go. The Jews have tried to do it by occupying Israel. Where can four million white South Africans go? No people will commit race suicide. South Africa cannot liberalize its form of government without the danger of chaos resulting on a vaster scale than that which occurred in the Congo in the sixties. The policy of *apartheid* is one way of dealing with an impossible situation in a way white South Africans believe is just to all races. Though I am reluctant to believe that is the only policy South Africa can adopt, it is the way she has chosen.

*Apartheid* is a policy most Americans disapprove of. This disapproval is not conclusive that it is wrong for South Africa at this time in her history. For that reason I think it would be wrong for America to interfere with the domestic situation in South Africa. The United Nations Charter used to be read as not allowing one nation to interfere in the domestic affairs of another nation. However true that used to be, I feel there is less justification for the United States to interfere in the affairs of any state in Africa than there was for her to interfere in Southeast Asia. Our intervention in the affairs of South Viet-Nam has proved to be a sad affair. Many of our domestic woes have arisen from an intervention in a situation of which we had no understanding. Few Americans I have met have any understanding of the conditions, the people, the history and the aspirations of Africa. The interests of this country are such that we would do well to avoid political involvement in Africa and the Middle East where we have no idea of who is really fighting whom and less idea of what it is they are fighting for. What interest we should have in these parts of the world ought be limited to those of a cultural and economic nature and not political and militaristic. Only when our economic interests are at stake should we attempt to exert political or military pressure in areas of the world of which we have no instinctive understanding. This I believe.

### III

It should not be our policy to change political structures in other states. We would not want other states to change our institutions. Imagine some Englishman demanding we change our form of government to a monarchy and threatening us with sanctions if we do not comply. We would laugh. Why should we demand the same of other countries? To say the South African Government is not representative of her population may be true. The same is true of Spain, South Viet-Nam, Greece and Jordan, to name four diverse countries. Even in our own country there are those who say our Government does not represent us. I believe that if we have a ruthless *de facto* system of *apartheid* in certain areas of the United States, then we cannot condemn a weakness in the South African character to promote a system for regulating human relationships. To do so would be to merely



transform our own failure to achieve a democratically just society onto another nation which has never boasted of being democratic in our sense and whose standards of justice are so alien to our own. I cannot honestly believe we would shirk our own responsibility for putting our own house in order first. By caring for our own discriminated and poor we would be in a better position to inspire change in South Africa rather than to venture into risky economic ventures that could lead us into another armed conflict in a faraway place.

#### IV

The effects of our businessmen withdrawing their investment from South Africa would be hard for the white man in that country. The effects are going to hurt the Bantu people more. A slowing down of industrialization in South Africa would adversely affect the economic progress of the Bantu people more than it would the white. Many white people feel they are living too well as it is and ought to have things harder for a while like their forebears in the last century. I assure you that the non-white peoples do not live well and would be living even less well. I feel the best chance for influencing change in South Africa and of influencing the South African Government to relax the harshness of its racial policy to her own people would be by retaining our present investment in that country, and perhaps increasing it, especially in the Bantu Homelands and in the border areas by those Homelands. Because our investment in South Africa enriches the white man there does not mean it does not enrich the Bantu and other non-whites. I believe that our investment in South Africa is beneficial to all races in that country and should be retained.

#### V

It is one of the great shames of American business in South Africa that the chief emphasis on investments has been on profits and little or no attention has been paid to helping advance the backward non-white people of that country or to leaving the country as a whole a little better as a result of being there. No doubt the South African Government does not provide tax rebate benefits as do our tax authorities for profits donated to public charities of one sort or another. Be that as it may, I would like to suggest that we should retain part of our profits in South Africa as a trust for the non-white peoples. I feel if we increase our financial stake in other countries we should also be as interested in benefiting those parts of the world which are developing and struggling as we are to secure maximum profits and to exert cultural and political influence. American investment can play a constructive rôle in advancing the non-white peoples with whose condition we sympathize. One suggestion I would like to put forward is that of a medical training hospital for African doctors in South Africa. There is no real training hospital for African doctors in that country and the need for one is great. I would like to see such a hospital given by the American business community which has derived so much corporate profit from South Africa as a gesture of our good will. Such a humanitarian gift

would, I presume, be welcome by the present South African Government. At least it would be tolerated. It ought to be the responsibility of our business community in South Africa to see to its funding and prosperity. It would also give us as Americans a stake in the task of uplifting a people to a dignified place with the more advanced people in that part of the world. Such a policy would be better than withdrawal of our investments or other boycott action which the more concerned of our people propose.

The CHAIRMAN described the format to be followed in opening the discussion to members of the audience. He requested short comments from each participant on the opening remarks as a means of initiating the discussion. The CHAIRMAN then gave the floor to Mr. Carlson.

Mr. CARLSON noted that because of his views he was forced through police harassment to leave South Africa. He further noted that the assumption is sometimes blandly made that the regime which is in power in South Africa will continue and not change. Such an assumption is supported by the fact that American investors in South Africa are helping *apartheid*. If such practices continue, the American investor in South Africa will lose the sympathies of blacks everywhere.

Mr. CARLSON indicated to Mr. Smith that if a nation practices immoral, obscene and indecent acts abroad, those immoralities will eventually be brought home, and in a society such as that of the United States, which is known for its rule of law and liberty, there will be a loss of the very rule of law and liberty that is striven for, and which sets the United States apart as a leader of today. In essence, if a nation practices immorality abroad, it will lose its morality at home. This, according to Mr. CARLSON, is the price of a nation's investment in South Africa.

Mr. NEWTON-KING mentioned what he termed the twenty-year fallacy. This is a *post hoc ergo propter hoc* fallacy that, because for the last twenty years the *apartheid* laws have been enacted and tightened, and there has also been during that same period an expansion of the economy, therefore an expanding economy does not affect the political realities. He pointed out that in 1948 a government was elected in South Africa whose policy was the policy of *apartheid*, and that policy would have been put into effect whether the economy was going up or going down. It is not a final solution to the argument on *apartheid* to draw a parallel between the strengthening of *apartheid* policies and economic expansion and say that because the two have existed together for twenty years they will continue to exist forever. Mr. NEWTON-KING believed that there are real changes to be seen coming and to come in South Africa due to the increase in economic strength of that country.

On the subject of what American business does or does not do in South Africa, Mr. NEWTON-KING noted a point raised by Mr. Smith that American investment elsewhere in Africa indicates a constructive use of State Department guidance for the American investor planning to invest in African countries. But if a typical multinational corporation put a tire factory in Nigeria and a tire factory in South Africa, what factors would determine which was doing the better job in Africa? Could one take,

for instance, the company housing project or the company medical aid project as indicators? Could one look to the level of salaries or the extent to which the company encourages and trains Africans for more responsible jobs? Mr. NEWTON-KING suggested that anything that can be achieved in Nigeria by American business can be achieved in South Africa. He received the impression from Congressman Diggs that the Congressman believed that there was some maximum wage level which required government action before one could exceed it. There is not. There are certain restrictions on employment, but not by and large in the areas in which American companies are active. The difficulties which American companies experience are not necessarily created by the Government of South Africa. Certainly, the Government has a policy on such difficulties, but they are not, for the most part, enacted into law. They are the difficulties in working with a white labor force. In other words, American companies, as with other employers, are reluctant to put into effect policies on African employment advances which could cause problems with their white labor force. There is nothing to stop them from trying, and a number of companies are doing this.

Mr. SMITH stated that he was not present as a representative of U.S. business, but as a representative of the U.S. Government. He indicated that the position of the U.S. Government is different from the position of several of the other members of the Panel. The U.S. Government does not defend the past record of U.S. business in South Africa. In fact, from a close observation for the past few years, the Government is quite convinced that most American businesses in South Africa have done very little to explore the limits of how far they can go in improving employment practices for non-whites. Most of them have done very little because their headquarters, located in Detroit, New York and Chicago, have paid relatively little attention except to the profits from South Africa which have been so good. Mr. SMITH suggested that the kinds of things happening in America these days, such as a growing consciousness among some groups of the problems of *apartheid* and of what it represents in South Africa, are going to have their impact economically and morally on the headquarters of American companies, and they in turn will stimulate their subsidiaries in South Africa to do a far better job than they have been doing in improving their employment practices and bringing some of the changes that have not been seen in the last twenty years.

On the question of how to compare the success of U.S. business in Nigeria with South Africa, Mr. SMITH was of the opinion that most American firms are able to be resourceful about looking in various parts of the world for good business opportunities. South Africa is not the only rich country or potentially rich country on the Continent of Africa.

Congressman Diggs in response to a request by Chairman Wachholz for comment expressed the view that the exchange between the Panel members would not change the minds of the various members of the Panel. Thus, he yielded his time for comments in the interest of opening the

discussion to members of the audience who would have questions to ask the Panel members.

Mr. BRANDER supported Congressman Diggs' request that the audience be involved in the discussion.

Mr. DURU directed his comments first to the Bantu Homelands proposal. He compared the Bantu Homelands to American Indian reservations. He indicated that a means of obtaining cheap labor is for a company to locate a branch on or near the Bantu Homeland reserves. Thus, the Africans would not have to travel to the factories located in such areas as downtown Johannesburg. They would remain in the Homelands. Mr. DURU characterized the Homelands system as a sophisticated means of exploitation in which the company moves to the center of cheap labor.

Mr. DURU also mentioned that South Africa has washed its hands of certain predictions on improved working conditions, such as those concerning the level of salaries paid to African workers by American companies. There is no law in South Africa stating that a ditch digger cannot conceivably be paid more than a lawyer. Thus, the American corporations are directly responsible for the maintenance of very low wages for Africans and high wages for whites. Mr. DURU further indicated that it is dangerous for the United States to not directly address a policy to this practice, *i.e.*, establish guidelines by the U.S. Government under which American companies would have to operate in South Africa.

The CHAIRMAN then opened the discussion to members of the audience.

Mr. FRANCESC VENDRELL, of the United Nations, speaking in his personal capacity, asked Mr. Newton-King for examples of the benefits that foreign business had brought to Africans in South Africa. Concerning his statement that honest employers like Ernest Oppenheimer had provided a great deal of happiness to the African population, Mr. VENDRELL wondered whether this was a reference to the living conditions of Africans working in Oppenheimer's mines. He had witnessed the kind of habitation provided for them, barrack-style dormitories with bunks on top of each other. Since African miners were not allowed to bring in their women and spent in the mines periods of one year or more, the result was the existence of a high degree of prostitution and homosexuality and a terrible incidence of venereal disease.

Concerning the material benefits which Africans had supposedly acquired as a result of the financial boom in South Africa in the past ten years, Mr. VENDRELL remarked that the gap between the European and the African standard of living had actually widened during that period. Figures that were published recently in *The Times* of London showed that, for example, in the manufacturing industry the average monthly wages of Africans between 1962 and 1967 had risen from £22 to £29 (R.44 to R.58) while those of Whites had gone up from £96 to £140 (R.192 to R.280).

Mr. VENDRELL asked Mr. Smith whether his government practiced a policy of *rapprochement* with governments of which it did not approve,

such as Cuba, for example. He also asked Mr. Smith why, if foreign investment was to change *apartheid*, did the South African Government encourage more and more foreign investment while the representatives of the black people of South Africa were against it.

Mr. NEWTON-KING questioned Mr. Vendrell's facts about the mines. He noted that, while most South African lawyers and many South Africans are interested in human rights, they are equally concerned with "bread." It is very easy for people in developed countries to misunderstand the conditions in an underdeveloped country. In Mr. NEWTON-KING's opinion the entire argument centers around the inescapable fact that, if jobs are not provided for two hundred thousand Africans every year in South Africa, a task which can only be accomplished by an increase in investments, the figures produced in the United Nations on income per capita will go down.

Mr. NEWTON-KING noticed in reading the propaganda produced on South Africa, the terrible statistics on infant mortality and Kwashiokor. He indicated that money and food can only be provided for people by growing the food and creating the money. Policies aimed at doing neither are not policies which are going to benefit South Africa.

Mr. CARLSON stated that more investment and improvement in South Africa has caused more hunger for black South Africans. He noted that there is more poverty and suffering than there ever was. A survey published in the *Financial Mail* showed that the individual African worker in Harry Oppenheimer's mines received one percent less in wages than he received thirty years ago when Mr. Oppenheimer founded his mining empire.

Mr. DURU expressed the view that because the black South Africans have suffered rather than benefited from foreign investment, a withdrawal of such investments would not be to their detriment. A withdrawal of investments would be more to the detriment of white South Africans.

Mr. ALEXANDER J. WALKER asked for some indication from Mr. Smith of how the problem of *apartheid* in South Africa is to be solved. He noted that Mr. Smith stated that he did not believe violence and boycott would produce change. Mr. WALKER also asked whether foreign investment can be a force for change in the absence of specific guidelines from the U.S. Government.

Mr. SMITH responded by stating that, if there is a possibility of change through foreign investment, it should be used to the advantage of those who are interested in change. As to the question of the U.S. Government's opposition to violence and boycott as means of producing change, Mr. SMITH noted that the bitter and frustrating experience in Southeast Asia is a major factor in the U.S. Government's opposition to the use of force and violence to initiate change in South Africa.

Mr. SMITH thought that guidelines would be useful as a means of establishing ways in which the United States private sector engaged in foreign investment could move forward in such areas as employment practices and health and education benefits.

Mr. ROBERT L. MCGEE noted that in 1965 the United States pulled its diplomatic personnel out of Rhodesia and supported a boycott of that country. He asked Mr. Smith whether he would find this action consistent or inconsistent with American policy towards South Africa.

Mr. SMITH responded that the boycott in Rhodesia, while still actively supported by the United States, has not brought down the rulers or changed the system. If anything, he noted, it has hardened the resolve and opposition of the minority government to maintain and strengthen its hold on Rhodesia. A boycott of South Africa is not foreseen.

Professor VED P. NANDA noted Mr. Brander's reference to Article 2(7) of the United Nations Charter, and stated that Article 2(7) has changed, at least in its United Nations context, in its interpretation. It was his belief that no nation-state at the present time can possibly shield its flagrant violations of human rights, and South Africa at the present time belongs in the category of those nation-states. It cannot be ignored that 125 countries have taken a stand or made a political judgment regarding the applicability of Article 2(7). That article has been interpreted to mean that violations of human rights internally cannot be tolerated and are of international concern. Professor NANDA noted that many Western countries are criticized for their alleged interpretation of Article 2(7) in two different ways. They rely on the article in order to say that they will not intervene when there is a flagrant violation of human rights, yet under the guise of humanitarian intervention they have Stanleyville operations, send troops into the Dominican Republic, and take action in many other countries when it suits their purposes.

Mr. BRANDER was aware that for many nations of the United Nations the idea of intervening in another nation's domestic affairs when the human rights of nationals or people of racial origin of the particular country are violated seems to be established. He felt this was certainly not a rule of general international law, and has never been accepted by either South Africa or many other countries as a rule of international law. It is disappointing that no nation of the world has accepted the Declaration of Human Rights as domestic law, that only seven nations of Europe have submitted to the jurisdiction of the European Court of Human Rights, and that the countries of the North American Continent do not have a regional court of human rights.

Mr. NEWTON-KING noted that at the Sixty-Fourth Annual Meeting of the Society, the American representative on the Human Rights Commission indicated that almost the only area in the world to which it has been established that Article 2(7) does not apply is South Africa and Southern Rhodesia!

Mr. DURU reminded Mr. Brander that the Universal Declaration of Human Rights constitutes an authoritative interpretation of the U.N. Charter of the highest order and has over the years become a part of customary international law.

A speaker asked Mr. Newton-King whether his firm or the Legal Aid Society in Johannesburg provides free professional legal representa-

tion to people who are imprisoned or prosecuted under some of the reprehensible security legislation.

Mr. NEWTON-KING responded that the Johannesburg Attorney's Association sponsors the Legal Aid Bureau and provides legal aid free to anyone of any color who needs it. In detainee cases ample money is available from overseas sources to employ attorneys.

Mr. CARLSON stated that the Legal Aid Bureau does not have the facilities to handle political cases. The Bureau is a small private organization supported entirely by charity and the Johannesburg Side Bar Association from which Government agencies have withdrawn all financial support. Mr. CARLSON noted that political cases are long and difficult cases and inevitably are not handled by the Legal Aid Bureau, which only has a branch in the Johannesburg Regional Magistrates Court area.

Mr. BRANDER stated that in his three years of law school in South Africa little emphasis was placed in the formal law school curriculum on what are termed "human rights" and "civil rights." The great emphasis placed on individual rights in United States Constitutional Law is virtually unknown in South African law. It was not until he studied at Georgetown University Law Center that he appreciated the extent to which society has an interest in preserving these rights even when this interest clashes with other societal interests such as the preservation of law and order.

A speaker noted that Mr. Newton-King defined change in South Africa in terms of an eradication of poverty. It was the speaker's opinion that most people analyzing the situation in South Africa would define meaningful change as a sharing of political power. He visualized South Africa as a pyramid with the whites on top, supported by a black working class. In such circumstances it is improbable that those on top would relinquish their power openly and freely without tremendous pressure being put upon them. Without political control and power in black hands, real and substantial changes cannot happen in South Africa.

The speaker mentioned that a group called the South African Foundation, which he characterized as an international lobbying and information-disseminating organization, is very much in favor of the situation in South Africa. It is an organization to which some American firms give grants and donations. The South African Foundation stated in a recent report that, whereas across the world there were sports boycotts and cultural boycotts against South Africa, in the main these could be disregarded because business and commerce continued as usual.

He asked Mr. Newton-King whether it was his hope or that of his Bar Association that economic help will lead to majority rule in South Africa in the next ten years.

Mr. NEWTON-KING responded that his Bar Association has not taken any position on the question of majority rule in South Africa. It would be very difficult for it to do so since the organization represents lawyers of all opinions.

Mr. MURRAY J. BELMAN was impressed with the earlier suggestion that some guidelines for American businesses investing in South Africa be es-

tablished. He asked Mr. Smith whether he would be willing to suggest to the Department of State that guidelines be formulated, and Congressman Diggs if he would favor some form of guidelines for American firms.

Congressman Diggs responded that the expressed policy of the Department of State is to neither encourage nor discourage investment in South Africa. The actual effect of this policy is to encourage investment in South Africa. The U.S. Government in the case of South West Africa has formulated a definite policy aimed at discouraging investment in that country. He questioned the need for a commercial attaché in the U.S. Embassy in South Africa and mentioned that he was certain that both the State Department and the Department of Commerce provided information on investment possibilities in South Africa to U.S. firms on an informal as well as formal basis. It was the opinion of Congressman Diggs that the major companies who have invested in South Africa could make feasibility studies of investment possibilities in other parts of Southern Africa.

Mr. BELMAN stated that he was concerned with the possibility of guidelines for companies that are already in South Africa. Such guidelines would require these companies to aid more in ameliorating the situation of black Africans living in South Africa.

Congressman Diggs stated that no guidelines of that nature existed that American companies could follow. He noted that many companies are looking with a great deal of interest at the Polaroid experiment. These firms have been inquiring of Polaroid of the status and progress of the experiment.

Mr. SMITH mentioned that, when an American firm approaches the Department of State for information about the possibilities of investment in South Africa, the State Department tells them of the problems. At the same time, the State Department actively encourages them to look at opportunities for investing in other African countries. One way in which the U.S. Government encourages investment in other African countries is through the publication of surveys on projects in progress in such countries. It also encourages investments by offering OPIC guarantees and AID loans to help American businesses start projects in countries other than South Africa.

On the subject of *rapprochement* with South Africa, Mr. SMITH indicated that diplomatic relations have existed between the United States and South Africa for a very long time. It could hardly be said that the United States' policies in regard to South Africa represent a *rapprochement*. The U.S. Government is not any closer to South Africa than it was twenty years ago. The positive arms embargo and the active discouragement by the U.S. Government of investment in South West Africa, because the Government opposed the illegal South African mandate over that country, can hardly be termed a *rapprochement*.

Mr. AMAD BUBULIA asked Mr. Newton-King several questions pertaining to his personal views on *apartheid* in South Africa. Mr. BUBULIA also



believed that isolation rather than an increase in communication with South Africa would foster change.

Mr. NEWTON-KING refrained from discussing his personal politics. Instead, in regard to the Polaroid experiment, he expressed the view that Polaroid was possibly over-reacting to a very small group of its own employees. He noted that the group of two blacks and two whites which Polaroid sent to South Africa to study the situation recommended that Polaroid not pull its investments out of South Africa. This was done after a full on-the-spot investigation in which the team interviewed many South African blacks, all of whom were against any withdrawal of U.S. business or investment.

Professor FRANK CHALK asked Mr. Smith what the U.S. policy towards South Africa will be if African nationalists are willing to accept arms and supplies from Communist countries to use against the South African Government. He wondered if, in 1982, there are serious incursions from countries north of South Africa and guerrilla forces are equipped with Communist weapons, whether the United States Government would maintain its present policy of neither encouraging nor discouraging action, or would the Department of State publish a White Paper on "Aggression from the North." He posed the same question to Congressman Diggs in hopes that he could speak more freely.

Mr. SMITH responded that the Department of State is certainly concerned that at present most of the arms support for liberation movements is coming from Communist sources. As of now, such supplies are not substantial, but the Department of State is watching the situation closely.

Congressman Diggs stated that in Congressional hearings he has raised the point of what the U.S. position would be in the event of some kind of confrontation. Would the United States feel obligated to come in, and on whose side would it come in? Congressman Diggs was of the opinion that it is dangerous to believe that confrontation is not possible in the near future. If the United States were to enter such a conflict on the side of South Africa, the result could be a revolution of global size and significance. It is unfortunate that U.S. policies are based a great deal on present controlling interests, as if the present controlling interests will remain forever.

Mr. J. GREGORY LYNCH was of the view that any guidelines formulated by the U.S. Government that would conform in any way with the legal system of South Africa, would still fall short of the guidelines established by the United Nations Council on minimum standards for human well-being. He noted that Polaroid faces the same problem in that it is confronted by the legal system of South Africa which inevitably revolves around *apartheid*. He favored the U.S. Government's efforts to encourage investment in other parts of Africa, but noted that any major shift of investments from South Africa to other parts of Africa could harden the resolve of the South African Government to maintain the *apartheid* system to the detriment of the black South Africans.

Miss MARSHA QUINTANA was of the opinion that the Polaroid experiment

forced both American and South African blacks to take a position that would favor keeping American investment in South Africa. She asked Mr. Duru for his comments on this point.

Mr. DURU characterized the Polaroid experiment as a "cop-out." He felt that the black revolutionary worker's movement brought to American blacks a greater awareness of the problems faced by black Africans in South Africa.

Mr. SMITH in speaking about Polaroid pointed out that the labor policies of Polaroid within the United States have been among the most progressive. It has rapidly increased minority employment and has set up a new factory in a predominantly black area of Boston in order to encourage employment. Thus, when the issue of investment in South Africa arose for Polaroid it was against the record of a very progressive firm in terms of its policies at home. Polaroid does between one and two million dollars in business a year in South Africa out of a total world business of 70 million dollars. Polaroid could have left South Africa as easily as staying in, at little cost to the firm. What Polaroid has in South Africa is trade through a South African company. Mr. SMITH noted further that Polaroid has ceased all selling to the South African Government, even though only a small proportion of these sales had been film for passbook photographs. Now all sales are to private buyers and involve such things as film and sunglasses. Since Polaroid has no subsidiary or branch in South Africa, it cannot be considered an investor in the proper sense of the word.

Miss JENIFER DAVIS noted the discussion as to whether the United States should or should not intervene in the affairs of South Africa. In her opinion, the U.S. corporations were intervening by investing in South Africa. She further felt that the United States was not as neutral in its policy on investment in South Africa as had been stated in the discussion. The U.S. policy encouraging communications coalesces with South Africa's new outward expansion. This desire for expansion into foreign markets by South Africa is necessitated by its expanding economy and its meager internal markets. The internal markets are small because only whites can afford to purchase the products produced by the black labor.

Miss DAVIS noted that in the last six months the United States has begun granting licenses to the Beech Company and other U.S. aircraft corporations to supply so-called light aircraft to the South African Government. This appears to be a relaxation of the arms embargo, and Miss DAVIS asked Congressman Diggs if it also appeared to him to be a relaxation of the arms embargo.

Congressman DIGGS responded that South Africa is receiving licenses to obtain very versatile machinery which could be used for a number of purposes. He indicated that when the U.S. Government is questioned on the use of the equipment that Miss Davis described as being for military purposes, the usual response from the Government is that a careful analysis has been made of the equipment and in the opinion of the U.S. Gov-

ernment it would only be used for the purpose indicated in the petition for the purchasing license.

Congressman DICCS further noted that there has been a relaxation in the granting of licenses in other areas. He mentioned the possibility that the Government would consider in the near future a petition by a U.S. firm for a license to import oranges from South Africa, and noted that there are many agricultural commodities being exported from South Africa. The effect of such exports is to further strengthen the *apartheid* system of government.

Mr. ELI WHITNEY DEBEVOISE asked Mr. Carlson and Mr. Newton-King for their comments on the statement of President Houphouet-Boigny of the Ivory Coast, that black Africa should trade with the Republic of South Africa, provided some conditions were agreed to, satisfactory to the trading parties. This had been held out as a way of ultimately ameliorating the *apartheid* situation. Mr. DEBEVOISE noted that President Houphouet-Boigny referred to an offer made by South Africa to other African nations inviting their representatives to South Africa on a free and open basis if they came in connection with trade. President Houphouet-Boigny did not state definitely that he was planning to go to South Africa at this time.

Mr. DEBEVOISE asked Mr. Carlson and Mr. Newton-King how such representatives would be received by the South Africans, including the black South Africans, and whether trade relations with other parts of Africa could have an effect on the *apartheid* practices of South Africa.

Mr. CARLSON responded that to invest in South Africa is to accept *apartheid*. He referred to the Lusaka Declaration as the proper course to be followed by African nations when it comes to trading with South Africa.

Commenting on a point raised earlier on the future possibility of conflict arising in South Africa, Mr. CARLSON reminded Mr. Smith that continued investment in South Africa may in the event of a conflict between South Africa and other African countries find the United States in a position where it must enter the conflict on the side of South Africa to protect these investments.

Mr. NEWTON-KING responded that he imagined the South African Government and many South Africans would be delighted at the prospects of trade and investment in other areas of Africa. He stated that one must consider that African leaders may make decisions not necessarily based upon human rights considerations as much as upon a desire to bring real prosperity to their peoples. It was his belief that there were many South Africans of good will of all colors who have a real contribution to make in Africa. He hoped that discussion and trade between South Africa and other African countries would have favorable results for all.

Mr. PAUL WHITAKER noted that in South Africa only the highest level of income for blacks overlaps with the lowest level of income for whites, while various laws have recently forced large numbers of blacks from jobs previously open to them and are forcing increasing numbers of blacks to move away from the primary sources of urban employment opportunities. In light of these conditions, he asked Mr. Newton-King how he could an-

ticipate any development of the type he had forecast in the employment area in South Africa.

Mr. NEWTON-KING did not accept this comment as factual and responded that instead of people returning to the Bantustans, statistics show an influx into the industrial areas of South Africa. He indicated that the statistics on the Bantustans are based on the segment of the African population that is living a pastoral life with their own standards of agriculture. One can hardly consider them part of a cash economy. In many parts of the world non-cash economies exist, and when the populations of these areas become overcrowded, poverty arises. It is thus necessary in South Africa to continue to grow, to provide jobs for Africans that migrate to the cities and to offset conditions of poverty, in all of which foreign direct investment has an important rôle to play.

The CHAIRMAN stated that the South African structure of government has been characterized as a forced labor system. He noted that the *Ad Hoc* Committee on Forced Labor of the United Nations, in 1953, and the International Labor Organization, in a 1964 study, have characterized the South African labor situation as forced labor. He asked Congressman Diggs and Mr. Smith whether the United States should take some action to insure equal protection for home-based industries which have to pay high wages, while the American firms in South Africa capitalize through high profits on the cheap South African labor. The CHAIRMAN asked whether a tax should be applied to these firms that would discourage their seeking large profits at the expense of non-white South Africans.

Congressman Diggs indicated that he was in the process of exploring the form which such a tax should take. If American foreign investment is to continue in South Africa, companies investing should pay for the high returns on their investments. The tax could take several forms. It could take the form of a contribution to be used to improve the welfare of the black workers. It could take the form of an equalized wage scale or a refugee fund. The various forms which the tax could take are numerous, and should definitely be considered.

Mr. SMITH stated that he could not usefully comment on the form which such a tax would take. The fact is correct that the profits of U.S. firms investing in South Africa are among the highest when compared to returns to U.S. firms investing in other foreign markets.

Mr. MICHAEL CHRISTIE in defense of the South African Foundation stated that the Foundation does take the stand that organizations that boycott sporting events involving South Africa should be disregarded. The Foundation believes that dialogue is productive and boycotts are counter-productive! Mr. CHRISTIE indicated that the South African Foundation represents a broad spectrum of white opinion in South Africa as well as a broad spectrum of political opinion. It is the belief of his organization that every opportunity that can be afforded to black and white South Africans for making contact with the outside world and receiving information on the opinions which other peoples of the world have of South Africa serves a beneficial purpose. The Foundation maintains as much contact

as possible. It would probably have far less effect in South Africa if it did not work within the framework of the laws of South Africa.

Mr. CHRISTIE mentioned that in Mr. Oppenheimer's mining organization approximately 80 percent of his labor comes from beyond the borders of South Africa. These are contract laborers who come to the mines voluntarily and may return four, five or even six times. The diet of an average mine worker equals 4,100 calories per day, which is approximately the same as that of a British serviceman. It is approximately 1,200 calories a day higher than that of the average British industrial worker. It is the belief of the Foundation that the contact between American and South African businessmen benefits the entire South African population. Mr. CHRISTIE stated further, that if there are super profits to be made by American firms, then perhaps these profits should be taxed and the proceeds placed in a special fund.

Mr. DURU was of the opinion that the South African Foundation was a propaganda organization which favored the South African Government and misinformed the American public. He advised Mr. Christie that correct information be supplied on the migration of labor from neighboring African countries into South Africa, and on how much the cost of food is accounted for in the salary of the mine workers.

Mr. CHRISTIE reiterated that workers migrating from central Africa return as much as six times in a row. He indicated that at present there are one million of these migrant workers in South Africa, and that they are there in search of a higher standard of living than that enjoyed in their homelands. He stated that the late Robert Kennedy, upon returning from a visit to South Africa had made the following remark: "The economic boom in South Africa has been the greatest force in breaking down apartheid." (*New York Times*, June 20, 1966.)

Mr. ARNOLD FRALEIGH asked Mr. Smith the extent to which the U.S. Government encourages or discourages investment in South Africa. Does the U.S. Government extend its investment guarantee program, which applies to a great many countries, also to South Africa?

Mr. SMITH responded in the negative.

The CHAIRMAN announced that the discussion would close by giving each participant a chance to make a closing statement.

Mr. DURU stated that South Africa is a developed nation in Africa according to a recent classification. Black Africans help to determine this classification by producing a large part of the economy of which they are not allowed to share. Every U.S. investor in South Africa should pull its investment out of that country, and leave the black South Africans to determine their own destiny, make their own laws and live their own lives. United States corporations present a danger to black South Africans because they are building factories which can be converted to military uses. Mr. DURU believed that South Africa's system of government is doomed, but its end hopefully should not be the end product of conflict or fighting. Peaceful means should be found to overthrow the South African system of *apartheid*.

Mr. BRANDER personally felt that politics and trade are two separate matters. Whatever America's political attitude should be, it should be divorced from trade and investment considerations. There could never have developed in the Middle Ages a commercial law in Western Europe if the people of one country had traded purely for political ends or if one country based its commercial policy on whether it liked another or not. Even the Islamic states of the Mediterranean and the Ottoman Empire traded with Christian Europe, although the philosophies of the two cultures were completely incompatible with one another. Mr. BRANDER felt that, having lived in South Africa, it would be very sad to have violent change. Peaceful change can take place in South Africa. In time and with certain pressure from abroad, the system of *apartheid* will evolve into a more just system.

Congressman DIGGS noted that at the beginning of the discussion Mr. Duru stated his frustration about participating in discussions on such subjects, because the time for rhetoric had either run out or was fast running out. He agreed with the observation of Mr. Duru. It was the hope of Congressman DIGGS that those who attended the round table discussion would contact their Congressional representatives to inform them of the questions which must be considered today in regard to African affairs. Many well informed people do not provide their representatives with information that could enable them to be better briefed when such matters arise for discussion and debate. Congressman DIGGS desired that members of the audience leave the round table discussion with intentions of contacting their Representatives and Senators to make known to them their views on such issues as investment in South Africa.

Mr. SMITH agreed with Congressman DIGGS. American policies are developed, maintained or changed through the process of voting for leadership and by reflecting through Congress the sentiments of the American public. The American public's feelings about such questions as continued investment in South Africa has directed the kinds of policies that the U.S. Government now has. Mr. SMITH reiterated that the Government neither encourages nor discourages U.S. investment in South Africa; thus, American firms will make their own decisions on the future of this investment. Mr. SMITH noted that two fellow panelists spoke of Apocalypse, Armageddon and doom, and the immorality of U.S. policy and continued U.S. private investment in South Africa. They had spoken in very impressive and very frightening terms, yet no one had suggested how withdrawal could affect South Africa. Mr. SMITH hoped that at a future meeting of the Panel the discussion could develop around how a policy of withdrawal could bring change.

Mr. NEWTON-KING stated that it is difficult to discuss South Africa abroad without spending an inordinate amount of time on the policies of *apartheid*, which have been in issue in the discussion, but only indirectly. He concluded that American companies have been in South Africa for a long time, and have done a great job. He hoped that they would continue with the good job they were doing.

Mr. CARLSON thanked Chairman Wachholz on behalf of the Panel for providing them with a forum to air their views on the subject of foreign investment in South Africa. He reminded Mr. Newton-King and members of the audience that it is wrong to say that *apcrtheid* has only an indirect bearing on the subject. Under the *apartheid* system is the labor unit system, which is characterized by poverty, suffering, degradation and deprivation of liberty. There is no middle ground. The choice is either to condone or condemn *apartheid* in South Africa.

The CHAIRMAN thanked the round table participants on behalf of the American Society of International Law and the Association of Student International Law Societies. He expressed his hopes that there would be other debates on the issues discussed by the Panelists. In closing he stated his belief that many Americans, especially students, will not resort long to genteel debate in the face of such a devastating problem.

The meeting thereupon adjourned.

## SIXTH SESSION

Saturday, May 1, 1971, at 9:30 a.m.

### Business Meeting

Pursuant to the notice of the meeting published in the January, 1971, issue of the *American Journal of International Law*, the business meeting of the American Society of International Law convened at 9:35 o'clock a.m. in the South American Room of the Statler-Hilton Hotel. President Harold D. Lasswell presided.

Judge EDWARD DUMBAULD, Secretary of the Society, read the list of members who had died during the year:

### *In Memoriam*

RICARDO J. ALFARO, Panama City, Panama, member since 1913, honorary member and member emeritus since 1966, died February 23, 1971.

A. A. BERLE, JR., New York City, member since 1946, died February 17, 1971.

PETER VICTOR BISHOP, Toronto, Canada, member since 1970, died June 28, 1970.

SAMUEL W. BLOCK, Chicago, Illinois, member since 1965, died October 28, 1970.

HENRY I. DOCKWEILER, Los Angeles, California, member since 1919, member emeritus, 1969, died 1970.

PHANOR J. EDER, New York City, member since 1920, member emeritus, 1970, died 1970.

JOHN H. FERGUSON, Washington, D. C., member since 1960, died 1970.

RICHARD O. CRAW, Berkeley, California, member since 1963, died October 23, 1970.

JEROME S. HESS, New York City, member since 1934, died August 27, 1970.

ROBERT LEE HUMBER, Greenville, North Carolina, member since 1947, died November, 1970.

JOSEF L. KUNZ, Toledo, Ohio, member since 1933, died August 5, 1970.

PHILIP LEVY, Washington, D. C., member since 1950, died May 22, 1970.

JOHANNES LEYSER, Victoria, Australia, member since 1962, died 1970.

MARIO G. E. LUZZATI, Milan, Italy, member, 1970, died October 9, 1970.

PHILIP A. RAY, San Francisco, California, member since 1967, died July 14, 1970.

WILLIAM HARVEY REEVES, New York City, member since 1947, died August, 1970.

G. FREDERICK REINHARDT, Zurich, Switzerland, member since 1934, died February 22, 1971.

WILFRIED SCHAUMANN, Wurzburg, Germany, member since 1952, died February 9, 1971.



NORMAN S. SCHMITZ, Chicago, Illinois, member since 1965, died November 7, 1970.

SIMON SEGAL, New York City, member since 1963, died 1970.

P. O. SETTLE, Fort Worth, Texas, member since 1950, died December 25, 1969.

JAMES SIMSARIAN, Chevy Chase, Maryland, member since 1932, died July 24, 1970.

ERICH SOELLING, New York City, member since 1945, died 1970.

G. HANSE VOELKEL, Panama City, Panama, member since 1947, died July, 1970.

QUINCY WRIGHT, Charlottesville, Virginia, member since 1916, member emeritus, 1966, died October 17, 1970.

The members rose and observed a moment of silence in memory of the deceased.

The Executive Director of the Society, Mr. STEPHEN M. SCHWEBEL, reported on the Society's activities during the past year as follows:

"The Society has had a good and active year. Its membership has expanded somewhat, but not at the rate of recent years, nor do I suppose we can continue to expand at the very rapid rate at which the Society has expanded in membership in recent years. It may be that an element in the slowdown of growth has been the increase in dues, and indeed at this juncture there are a substantial number of unpaid members, many of whom we hope will pay.

"Plans are in process for a new membership drive, which has not been pursued the last six or eight months due to more than one factor, notably a lack of funds allotted to that purpose.

"I should note that the element of the Society's membership that has been the fastest growing is that of the foreign membership, which is substantial—over a thousand and heading toward fifteen hundred—and is unusually large for an American-based learned society. That, of course, is entirely in conformity with the spirit and purpose of the Society.

"As for our activities, the Annual Meeting you have seen and are seeing. I think John Norton Moore is to be congratulated on an outstanding job in conceiving, organizing, and guiding so successful a meeting. (Applause)

"There have been a substantial number of regional meetings, and my impression is that they have been substantially successful. I have had the pleasure myself of participating in two out of a dozen this past year and both were of excellent quality—one of which was exceedingly well attended, and I might parenthetically note that Ved Nanda, who organized that meeting in Denver, seems to have an extraordinary flair for successfully organizing regional meetings of both high quality and attendance and, I might note, of a very interesting degree of student participation.

"It is planned under the new budget adopted by the Executive Council Thursday to expand somewhat the number of regional meetings this coming year.

"Study Panels of the Board of Review and Development have been ac-

tive perhaps as never before. And that is, in substantial measure, due to the much-valued addition to the staff of a Director of Studies, and in particular, the Director of Studies. We are privileged to have Larry Hargrove, who is devoting great care to the nurturing and propagation of our Panels of the Board of Review. A number of them have very substantial programs of study, research, and discussion under way.

"A few new Panels were formed this past year, notably those of the Global Environment, International Implementation of Human Rights, and the International Court of Justice. Others are planned, although the number of new Panels that it will be possible to launch within present staff resources is limited. It may well be that some of those now in existence will have to wind up their work before much fresh endeavor can be launched, and a number are winding up their work.

"The flow of publications stemming from work of Panels of the Board of Review and from other research activities of the Society has mounted perceptibly this year, some half dozen books having been published within the last six months, and a number more being in press and coming down the pike. Those include 'Foreign Enterprise in Mexico,' which was commissioned a good many years ago under our first Ford grant, and 'Foreign Enterprise in Japan,' the draft manuscript of which was reviewed by an advisory group last Monday, and which we hope will be in the hands of the publisher by the end of the summer. That will complete that long pending series.

"The remaining volumes are those that flow from the work of the Board of Review study panels and conferences, such as conferences of official legal advisers. Two volumes flowing from those conferences will appear this year, of the third and fourth conferences.

"A fifth will be held in September of legal advisers of the United Nations, Specialized Agencies and regional organizations, and a few others, on Problems of the Global Environment. And we are hopeful that a book of papers and a distillation of its discussion can be promptly published following that conference and before the United Nations Conference on Human Environment in Stockholm in June of 1972.

"Now, of course, the heart of the Society is not so much the books it publishes as the periodicals it publishes, and most of all *The American Journal of International Law*. I am confident that you all agree that under the Editorship of Dick Baxter and with the unflagging help of Miss Finch and Mrs. Conley, the *Journal* has maintained its customary standards of excellence.

"As most of you doubtless know, Dick Baxter will be spending a year, beginning July 1st, with the Department of State, as Counselor on International Law to the Legal Adviser of the Department, succeeding Louis Sohn in that new and important post. He has, accordingly, taken leave for that year from his duties as Editor-in-Chief of the *Journal* and Brunson MacChesney has been gracious enough to agree to serve as Acting Editor-in-Chief during the year when Dick Baxter will be in governmental service. The Editors of the *Journal*, of course, are ever open

to suggestions for improvement, and your contributions, by way of publishable material, which will further enhance the quality.

"The circulation of the *Journal* has continued to increase, both with the increase of membership and otherwise, and, I think it is fair to say, remains the leading periodical in the world in the sphere of international law. There has been some modest growth of advertising in the *Journal*. This is a matter to which the staff has devoted some attention and which, we hope, will move forward further still.

"*International Legal Materials* has had a remarkable growth in circulation in recent years, and that has been maintained this past year, when percentage-wise the circulation has risen rapidly, and the sale of its back volumes has surged also. Sales of the whole set of *International Legal Materials*, from 1962 onward, have been most gratifying. Finally—and after regrettable delay—a cumulative index to *International Legal Materials* has appeared, in a sense a decennial index. It covers all the years of the last decade in which "I. L. M." was published, and that will further enhance the value of that publication.

"Circulation of I.L.M. is now close to 1,700. While that is close to three times what it was four years ago, it still is a good deal too small in our view, and that is the more striking when compared with the *Journal's* circulation of some 8,000. We do plan to take steps this year, not only for a membership drive, but to further increase the sales both of the *Journal* and of *International Legal Materials*.

"If I may, permit me to say a word about that always important and sometimes gloomy subject—finances. As you will recall from the discussion last year and the reports of the Society, which are available and have been published and noted in the "Newsletter," the Society received in the course of the current fiscal year a third major grant from the Ford Foundation; not as major as the prior two grants, either in its span of time—this grant being three years in contrast with the previous two grants of five years each—or in sum of money, but nevertheless, a very substantial and altogether vital infusion of support without which many of the activities to which I have referred could not be sustained. That grant had, so to speak, one rub, and has still, and that is the provision of a matching character. The Society will receive one dollar of Ford funds for each three dollars of income from other sources than Ford. That includes our membership dues, our income from publications, as well as other foundation grants, income from investments and miscellaneous sources.

"It has been a principal—I could almost say 'the principal'—preoccupation of the staff this year to raise funds sufficient to enable the Society to draw the whole of the Ford grant. Absent that, we would soon be in most serious financial straits. Those efforts are going forward, although by no means consummated. But as those of you who received the current 'Newsletter' before you left your homes to come here may have noted, the Mellon Foundation has given the Society a grant of \$50,000. And you may have noted in an earlier issue of the 'Newsletter' that the Carnegie Endowment for International Peace agreed to sponsor certain pro-

grams jointly with the Society to the extent of \$40,000, to be expended before June of 1972.

"The Society also has been energetically pursuing the possibility of support from the National Science Foundation for a study on International Regulatory Regimes, and for Panels of the Board of Review and Development of scientific interest, notably those on the Global Environment, the Law of the Sea, Nuclear Energy, and International Telecommunications. And both grants sought from the National Science Foundation, while not made, look promising. The Foundation has given Harold Lasswell and others of us a very courteous and sympathetic hearing, and has encouraged the Society to put in formal applications; that has been done, and the prospects, as best we can judge, are good. If those good prospects indeed mature, we will be home free, as far as the matching requirements go, for these remaining two years of the Ford grant, and will receive all of the Ford grant.

"Now the Ford grant runs out in two years. We shall have to begin to negotiate for fresh support, and probably in less than a year, and what the outlook is for continued Ford support or other foundation support beyond this current two-year span, it is impossible to say. But I think that we can safely say that so far, so good, and what looked worrisome indeed a year ago looks rather less so at this juncture.

"I believe, Ladies and Gentlemen, that covers the large buildings on the Society's waterfront. I would be delighted to answer questions, if you have any."

President LASSWELL expressed the appreciation of the Society for the accomplishments of the Executive Director, the Director of Studies and other members of the staff.

He next presented the nominations of officers for the coming year made by the Nominating Committee in March and circulated to the members of the Society in the *Newsletter* for March, 1971. Upon motion from the floor, duly seconded and carried, the report of the Nominating Committee was adopted and the nominees declared elected, as follows:

*Honorary President:* Philip C. Jessup

*President:* Harold D. Lasswell

*Vice Presidents:* Richard A. Falk, John N. Hazard, William D. Rogers, Stephen M. Schwebel

*Honorary Vice Presidents:* Dean G. Acheson,\* William W. Bishop, Jr., Herbert W. Briggs, Arthur H. Dean, Hardy C. Dillard, Charles G. Fenwick, Leo Gross, Green H. Hackworth, James N. Hyde, Hans Kelsen, Charles E. Martin, Brunson MacChesney, Myres S. McDougal, Oscar Schachter, John R. Stevenson, Robert R. Wilson.

*Members of the Executive Council to serve until 1974:* Arthur R. Albrecht, Richard B. Bilder, L. M. Bloomfield, Mitchell Brock, William T. Coleman, Rita Hauser, John Norton Moore, Ewell E. Murphy.

The CHAIRMAN then presented the nominations of the Executive Council for the Nominating Committee members for the coming year, namely,

\* Deceased October 12, 1971.

Francis O. Wilcox, Chairman; Jose Cabranes, Edvard Hambro, Carlyle Maw and Howard Taubenfeld. He stated that as a transitional measure there would also be a student consultant to the Nominating Committee, whose name would be submitted by the Association of Student International Law Societies.

Professor RICHARD B. LILLICH stated that there was some sentiment among some members of the Society that the proposed slate for the Nominating Committee was neither representative nor balanced. He therefore nominated for the committee three persons: John Carey, Thomas Franck and Richard Falk. An unidentified speaker nominated Douglas Wachholz, President of the Association of Student International Law Societies.

Mr. SCHWEBEL explained the considerations underlying the Executive Council's nominations and called attention to Article IV of the Society's Constitution providing that the Nominating Committee shall consist of the five members receiving the highest number of ballots. The members at the meeting had therefore to elect the five members of the Nominating Committee from among the names proposed by the Executive Council and those nominated from the floor.

There followed a full discussion of the representation in the Executive Council and other bodies of the Society of the numerous professional and scholarly elements in the Society, including the students. The view was expressed that, in view of the substantial size of the student membership, students should be represented, not by a consultant to the Nominating Committee, but by membership on the committee.

The CHAIRMAN announced that a written ballot would be taken, that only members could vote, and that each voter should vote for no more than five persons, and indicate his choice of chairman of the committee. Members were also instructed to sign their ballots for the purpose of establishing their legality, if questioned.

Pending the tabulation of the votes and announcement of the results by Secretary Dumbauld, the meeting proceeded with other business.

Professor MYRES S. McDOUGAL, Chairman of the Committee on Annual Awards, reported the recommendation of the committee, which had been unanimously approved by the Executive Council, that the Society's award be given to Dr. Rosalyn Higgins for the first and second volumes of her publication entitled: *United Nations Peacekeeping 1946-1967: Documents and Commentary*.

The Chairman next called upon Professor R. R. Baxter, Chairman of the *Ad Hoc* Committee on Governance of the Society, who stated that the report of the committee recommending amendments to Articles IV and VI of the Society's Constitution had been considered by the Executive Council, which had approved the submission of the amendments for adoption. The committee's recommendations concerning changes in the Society's regulations had also been approved by the Council.

Upon motion duly made, seconded and carried, the following amendments to the Constitution were adopted:

Amend the present third and fourth paragraphs of Article IV of the Constitution to read:

Candidates for all offices to be filled by the Society at each annual election shall be placed in nomination either by a petition signed by not less than twenty members of the Society and submitted at least ninety days in advance of the annual meeting or on the report, submitted at least one hundred and eighty days in advance of the annual meeting, of a Nominating Committee, which shall consist of the five members receiving the highest number of ballots at the business session of the preceding annual meeting of the Society. Nominations for membership on the Committee may be made by the Executive Council or on the floor.

For all offices as to which there is no nomination by petition, election shall be by a single ballot cast by or on behalf of the Secretary of the Society at the business session of the annual meeting. In the event that there is a nomination by petition for any office, that office shall be filled at the annual meeting by a majority vote of the members of the Society voting either in person or by a postal ballot mailed to the members of the Society at least sixty days before the annual meeting. All officers shall serve until their successors are chosen. The Council may fill vacancies until the next annual meeting of the Society.

Amend the second sentence of the second paragraph of Article VI of the Constitution to read:

Eight members shall be elected by the Society each year according to the same procedure prescribed for the nomination and election of officers of the Society under Article IV of this Constitution. The service of Council members shall begin at the meeting of the Council immediately following the meeting of the Society at which they are elected.

Miss ELLEN FREY-WOUTERS, commenting on the openness of the Society's organization, maintained that there was a lack of representation of women and blacks in the slate of officers, the Annual Meeting program and in the Panels of the Board of Review and Development. The Society, she said, had taken a turn for the better with the advent of Richard Falk, but it remained much too narrow in its outlook and composition.

Professor BAXTER replied that the question of more participation in Society activities by women members had been given consideration by the *Ad Hoc* Committee on Governance. He suggested that there be organized an *ad hoc* committee of women members to pursue the matter. He further stated that the question of negroes participating in Society activities had also been given serious consideration. The prevailing view of the *Ad Hoc* Committee was that membership in the Society should be solicited from all segments of the international law community. This question of negro participation, however, might also be pursued by a special *ad hoc* committee.

A woman member stated that the Society had honored women for their scholarship and advocated consideration of scholarship as the qualification for membership and Society activity and office rather than race, sex or other criteria.

The proposed amendment to Article IV provided that candidates for office could be nominated by petition signed by fifty members of the Society. A discussion ensued as to the desirability and feasibility of requiring as many as fifty signatures to a nominating petition. It was replied that, in view of the greatly increased size of the membership (about 5400), a larger number of signers should be required for petitions, which would eliminate a multiplication of local petitions. The principal reason for changing the nominating procedure was that the previous arrangement was adapted to the hitherto smaller membership but was not adequate to reflect the wishes of the much larger organization the Society is now.

Professor JOHN JACKSON raised a question regarding the past experience of the Society with nominating petitions requiring only ten signatures. He stated that the proposed amendment to the Constitution requiring fifty signatures for nominating petitions would operate to close the Society rather than open it, although the latter result is the objective. He therefore moved that the number of required signatures be changed from fifty to twenty. The motion was seconded. A question was raised whether the amendment proposed by Professor Jackson could be voted on at once or must be circulated in advance to the membership. The CHAIR ruled that the amendment to the amendment could be considered and voted on at the meeting. After discussion *pro* and *contra*, the amendment proposed by Professor Jackson was put to a vote and carried.

It was then moved, seconded and carried that the Report of the *Ad Hoc* Committee on Governance be adopted. The recommendation was made from the floor, and accepted by Professor Baxter, that other *ad hoc* committees be appointed to appraise the Society's activities from time to time.

The CHAIRMAN expressed appreciation on behalf of the Society to the *Ad Hoc* Committee and to Professor Baxter for their excellent work in studying the organization and activities of the Society and in preparing its carefully considered report.

Secretary DUMBAULD then reported on the balloting for the members of the Nominating Committee for the coming year. He stated that a number of votes had been cast for Professor John Norton Moore, who was not a nominee. These votes could not be considered. A number of unsigned ballots had also been cast and had been separately counted, but these made no difference in the result. The five candidates who received the highest number of votes were, in the order of the number of votes received: Edvard Hambro, Richard Falk, John Carey, Douglas Wachholz and Jose Cabranes.\*

\* Following the close of the annual meeting, the Secretary of the Society, Judge Edward Dumbauld, compared the signed ballots with the membership list of the Society as of May 1, the day of the business meeting at which the election was held. He found that a number of ballots had been cast by persons not members of the Society. After recounting the valid votes cast, eliminating the invalid ones from the total cast, the result showed Messrs. Hambro, Falk, Carey and Cabranes elected to four places on the committee, and Francis Wilcox and Douglas Wachholz tied for the fifth place. The Executive Council decided to treat both Dean Wilcox and Mr. Wachholz as members of the Nominating Committee.

Mr. JOHN CAREY, Chairman of the Committee on Publications of the Department of State and the United Nations, reported for the committee (for printed report, see below, p. 393), and presented for adoption a resolution on the publication of the *Foreign Relations of the United States*.

In connection with the resolution, Mr. E. Ralph Perkins, a member of the committee and formerly of the Historical Office of the Department of State, stressed the need to bring pressure to bear on the members of Congress and officials in the State Department to have the publication of *Foreign Relations* brought up more nearly to currency. He referred to the discussion of China and the United Nations at one of the sessions of the Society and noted that the official record of the relations of the United States with China has been published only up through the year 1945. Although the record of the important years of the takeover of China by the Communist government has been compiled, it has not yet been published. It seemed to him that, when considering the relations of China and the United States and the United Nations, we should have available the official State Department record.

Mr. PERKINS also referred to the scholarly character of the personnel in the Historical Office of the Department and the possible effect upon the Office of the reorganization now in progress by which the whole Department is being integrated into the Foreign Service. It was important to maintain the scholarly character of the Historical Office and especially the Foreign Relations Division.

Mr. CAREY thereupon moved the adoption of the following resolution:

RESOLUTION ON THE PUBLICATION OF FOREIGN RELATIONS OF THE  
UNITED STATES

*The American Society of International Law* at its 65th Annual Meeting in Washington, D. C., May 1, 1971,

*Convinced* of the need for public availability of the official documentary records of the diplomacy of the United States while these records are of sufficient nearness to currency to be of value in understanding present problems relating to international relations,

*Concerned* at the increasing time lag in the publication of *Foreign Relations* volumes containing these records, now twenty-five years behind currency, and at the failure of the government to take effective measures to remedy this situation,

*Concerned* also that the high scholarly standards in the preparation of these volumes be maintained,

*Resolves* to call upon the Department of State and other agencies of the government involved in the preparation of these volumes and in their clearance for publication to take effective measures to check the increasing time lag and to start a return to publication nearer to currency; and further

*Resolves* to call upon the Department of State to see to it that in any departmental personnel reorganization the established professional scholarly character of the staff compiling the *Foreign Relations* volumes will be preserved.



After a brief discussion of the nature of the contemplated reorganization of the State Department in relation to the Foreign Service, the above resolution, having been seconded, was duly passed.

The CHAIRMAN then called for comments upon the program of the meeting and suggestions for the planning and organization of future meetings.

Mr. PETER TROBOFF commented on student participation in the annual meeting and in regional meetings of the Society, and suggested that there be greater guidance and co-ordination between the senior participants and the students. He stated that there was a great deal of eagerness on the part of the students to participate in the meetings.

The CHAIRMAN called attention to the new Committee on Student and Professional Development of which Mr. Troboff was a member. Mr. Troboff had been particularly active in promoting a number of beneficial changes in the Society's procedures and its impact on other organizations.

Mr. EVERETTE NOLAND referred to the question raised by Professor Jackson and Mr. Troboff concerning participation by younger members of the Society in the study panels in areas of interest to the younger members. He suggested organization of a support group composed of younger members, including students, in some kind of relationship with the Panels. In such a way the younger members could receive training and development in international law. For this purpose the Society might serve as a training institution.

Mr. RICHARD FINE suggested, in connection with the newly adopted amendment to the Constitution of the Society concerning nominating petitions, that, prior to the time for nominating petitions to be submitted, the Society send with its *Newsletter* a list of the names of all the people who would like to be nominated. The members could check the lists and the lists could act as the nominating petitions.

Mr. JAMES CONNER spoke in support of the suggestion of Mr. Noland that the younger members of the Society be given the opportunity to work with the study panels of the Board of Review and Development.

The CHAIRMAN, upon a motion for adjournment, declared the meeting adjourned at 11:45 o'clock a.m.

SEVENTH SESSION

Saturday, May 1, 1971, at 2:40 p.m.

ROUND TABLE: Toward More Adequate Diplomatic Protection of Private Claims: "Aris Gloves," "Barcelona Traction," and Beyond

(Jointly Sponsored with the Deutsche Gesellschaft für Völkerrecht)

The Round Table was convened at 2:40 o'clock p.m. in the Senate Room of the Statler-Hilton Hotel, Professor Richard B. Lillich presiding.

The CHAIRMAN. Our Round Table here today is to discuss various aspects of two cases and their impact upon the diplomatic protection of individuals in international law.

When this topic was originally posed to me by my colleague who has been the Chairman of this year's annual meeting, it was limited to the *Barcelona Traction* case, strictly by itself, and I suggested that since the Society had not considered for some years, indeed ten years, the relationship in the area of national and international law of the individual with particular reference to his own domestic legal environment, constitutional and administrative, perhaps it might be better to expand the topic and to take into account the *Aris Gloves* case. And so this will be the subject of our Round Table, and indeed it is to be a Round Table in the true sense of the word.

I think that I shall introduce the people on the Round Table today. Starting at the far left of the table is Brian Flemming of the Nova Scotia Bar. He has been active in the American Society for many years, and he was writing about the *Barcelona Traction* case when many people, I am sure, had not heard of it yet. Our second speaker certainly needs no introduction. Dr. Martin Domke of New York is an expert in this area, as well as in many other areas of international law. On my immediate left is Dr. Ignaz Seidl-Hohenveldern of the University of Cologne, one of our many distinguished foreign guests this year. Dr. Seidl-Hohenveldern appears here because this Round Table is being sponsored not only by the American Society of International Law but also by our equivalent in Germany. On my immediate right is Lucius Caflisch. He has the honor, I should say, without saying more, of having been cited in the *Barcelona Traction* case. Whether it is an honor to be cited depends, of course, on what of the many judgments you agree with! (Laughter)

Our next speaker is Professor Burns Weston. Had not Professor Weston been busy writing a distinguished book on French claims practice, he and I would have achieved an earlier submission date with respect to our endeavor of the last few years on lump-sum settlements. Had it been written, the decision, perhaps, would have been somewhat different than the case under discussion! (Laughter) And, finally, to my far right, is Mr. Gordon Christenson, now Dean for Educational Development of the State University of New York. Mr. Christenson is an expert in this area from his

days in the Legal Adviser's Office in the Department of State and, of course, he is a writer and an author of some note.

Now with this background to introduce our Round Table, let me tell you a little bit about the ground rules. We have gone over, first in correspondence and then at a luncheon today, several of the more important areas, and we would like to take the first hour or so to discuss these topics with you in a very informal fashion. There will be no presentations. What we will be doing is raising certain issues and having certain members of the Round Table comment upon them. Indeed we have no set form of presentation here. People will speak when the spirit moves. At the end of approximately one hour, we shall open it up for discussion for another hour, and here I would hope that we would have a very free discussion, with emphasis on short statements prefatory to questions that can be directed either to one member of the Round Table or to our entire group.

The *Aris Gloves* case is not a distinguished case in any way except that it raises a whole host of fundamental international law questions that have been decided, as we have found out in our discussion, the same way in most nations. It involves a California corporation that contended it had a claim for certain properties that were in East Germany at the end of the second World War. It claimed that, because of a waiver of its claim in the Potsdam Agreements by the United States, it had lost property, that property had been taken in terms of the waiver of the claim, with resultant loss to the company, and that this constituted a compensable taking of property under the Fifth Amendment. The Court of Claims dismissed its complaint, but the interesting development was a rather long and fairly learned concurring opinion, concurring but nevertheless raising a whole host of issues about the relationship of the individual in the process of bringing the claim before it reaches the diplomatic state-to-state level. If we are going to talk about the whole process of diplomatic protection, it is useful to start right from the beginning, and this is what we propose to do in the first few minutes of our session today.

With that by way of introduction, let me raise the first question for any of the members of the Round Table who wish to speak: In effect, is the *Aris Gloves* case not only an accurate statement of the law of the United States, but of international and national practice as well? Does a state have any duty to an individual—assuming here that he is its national—to accord diplomatic protection, and if so, is this required by either international law or national law?

MR. GORDON A. CHRISTENSON. I think the decision is an accurate statement of the existing law and practice, with perhaps one exception not based upon the facts of the case, but a brief summary of well-known principles which the United States has adopted and which, I think, is clear in other state practice, that the state owes no duty to accord diplomatic protection to individual nationals injured abroad by foreign governments. Indeed, even if it has extended and accorded diplomatic protection, the claimant state may waive such claims and settle them in the interests of the state.

I think, under Constitutional law, there is a good question that *Aris Gloves* does raise, however, and that is posed in a fact situation similar to the *Seery* case in the Court of Claims, where in 1945 in Austria the United States took some American property for an officers' club. In that case, despite a waiver by executive agreement, the Court of Claims held that there was a compensable claim under the Fifth Amendment and made an award on the claim. I think, therefore, the *Aris Gloves* holds out that possibility.

The old *Gray* case, you all recall, resulted from the French spoliations and their settlement whereby, under a political commitment by Jefferson, American privateers engaged in the undeclared naval war with France by running blockades and other practices. Subsequently, the court, giving an advisory opinion to the Congress, recommended that there was a moral right of compensation. The Congress then acted on it and arranged some compensation, as I remember. In sum, there is no duty under existing law, although I think there is an open question under the Constitution.

The CHAIRMAN. Let me just pass on another step before I ask some of our foreign visitors to comment on the attitudes of their own foreign offices and their own courts. Assuming that we decide that a claim is a valid claim for purposes of being brought in the international community, and a state makes the decision to espouse the claim—now we are assuming that it makes no difference whether there is a duty or not—what happens after the decision to make the espousal has been made, if the state either fails to press the claim adequately, or waives the claim, or, at least here in the United States, waives a pre-adjudicated claim, that has been decided by the Foreign Claims Settlement Commission, by a subsequent lump-sum compensation agreement? Is there a difference here? Does this give rise to any international problems or any national problems of a Constitutional nature? I look to Dr. Domke here because he is a long-standing advocate of a position.

Dr. MARTIN DOMKE. Yes, it is a generally accepted practice in international law that an espousal of a claim is an act of grace by a state, and not the right of the individual that the state gives protection. But even if we assume that there is such a right, if the state fails to exercise this diplomatic protection, this would not amount to very much. What can the individual do? Under municipal law he may sue his own government for not fulfilling performance of a duty which is owed to the citizen; he can ask for reparation, but how does he prove that any damage occurred just by the fact that the state did not exercise the diplomatic protection? He has hardly any possibility of proving such damage and he has no case in any country which has decided a case on this issue.

Now the further question arises, which your Chairman raised: When the state has espoused the claim and it later waives the claim, do you have a Constitutional right? And I believe I disagree with Mr. Christenson, because as a national you have the right for your property to be protected. •

We have the serious situation in some agreements with Poland and Rumania where the United States expressly declared that it will not espouse a claim against these foreign countries for its own nationals. I believe this is a deprivation of your rights of property protected under the Constitution, and when I discussed these issues some years ago with the State Department, they said "Find a lawyer who will make a test case on this issue." I looked around, but nobody was able to do it.

I believe that the question of espousal, which will be a big issue in today's discussion here, has no direct validity any more. The trend of international law is undoubtedly to the effect that the individual should have access to international adjudication. We have the World Bank Convention on the Settlement of Investment Disputes. We have the proceedings in the Human Rights Court in Europe. The trend is definitely to take away from the government the political issue of presenting a claim to another government. We should try to pursue the trend of international law that the individual should have access to international machinery, and we will, in the course of our discussion, give some examples of how this works.

The CHAIRMAN. I think that this might be a useful time to have our foreign members comment upon the various points that have been mentioned so far from our national perspective.

Dr. IGNAZ SEIDL-HOHENVELDERN. I can answer this on account of a study I made recently into claims by French citizens against France for compensation for property taken in Algeria, by Germans against the Federal Republic of Germany for property taken, and similar situations in Austria. The answer is everywhere that the individual does not get anything. But the result, I feel, is rather revolting, because, first of all, if these people turn to their own state, they say: "Be quiet; we are still negotiating. Maybe we will get something out of Algiers or maybe we will get some property returned, and if we pay you now, we prejudice our success." Then afterwards they say: "You see, now it is too late. Your property abroad is lost, of course, but it wasn't worth anything any longer, so we don't need to protect you!" And then they go on to say, as also in the *Aris Gloves* case: "Any taking which was done, was not done by us. It was done by a foreign authority." That is in reply to the claim by an individual, on a Constitutional issue which presents itself in more or less the same manner in most countries.

In very many other fields, the individual who has to give up property rights for the benefit of the community, who has to make a special sacrifice, has a claim to national solidarity to be compensated for this excess sacrifice. However, to claims for compensation based on refusal of diplomatic protection the ministers of finance always reply: "Well, we accept national solidarity, of course. We pay the victims of an avalanche disaster or the victims of a tornado. But this is no national calamity. This was done by foreigners." But I think that in some cases, at least, the inactivity of the national authorities could also be a national disaster. (Laughter) That is one thing.

My second point concerns a situation which occurs after espousal. Just before I left, a declaration was made in the Austrian Parliament concerning a case before an international arbitral tribunal between Austria and the Federal Republic of Germany. It was initiated by the former Austrian administration. The new head of the government declared in Parliament that he does not believe that Austria's claims against the Federal Republic of Germany will be successful before this arbitral tribunal. However, he believed that he could not now back out of it, because originally the former administration had agreed with the aggrieved Austrian citizens to bring these claims before an international arbitral tribunal, and, therefore, unless he can get an agreement of these aggrieved individuals, he did not feel authorized to stop the proceedings before the arbitral tribunal, in spite of the fact that it was an intergovernmental arbitration. This may be an interesting illustration that, after all, some states, at least, may perhaps gradually come around to see some merit in the claims of individuals whose interests are sacrificed for the greater benefit of the national interest. Some such evidence may be found here and there, but in practice, well, the situation is as bleak as my colleague, Martin Domke, has just said.

Mr. BRIAN FLEMMING. Mr. Chairman, although I am emotionally attached to the position that Professor Domke has put before us, in Canada the situation is very simply summarized: It is the same as has been outlined by those who have spoken thus far. There is no duty on the part of the government, as far as it is concerned, to protect Canadian nationals or citizens. The matter comes within the area of the Crown's prerogative; if it decides to espouse, well, that is fine. Now we do not even have (although by some stretch we could possibly have in the future) the possibility of bringing this within the area of Constitutional law.

We have a Bill of Rights, which has been very little used over the last eleven years, which could possibly, by judicial interpretation, give Canadian citizens somewhat the same type of rights that citizens are given under the Fifth Amendment in the United States. But we are still a long way even from having an approximation of the *Aris Gloves* situation in Canada and the sort of reasoning that went into that case.

Mr. LUCIUS C. CAFLISCH. First, a very brief point on diplomatic protection on the international level. I, too, am of the view, of course, that there is no obligation of the state to extend diplomatic protection to its nationals for the very simple reason that, for the time being, I still believe that states are subject to international law and that individuals, as a rule, are not. A subject of international law could hardly be under an international obligation toward a non-subject of international law.

Now I am quite aware of recent efforts to turn individuals into subjects of international law, especially in the field of protection of human rights. I am also aware of the existence of the World Bank Convention. But I do think that these trends, for the time being, are rather platonic. If they were to mature eventually, there would be no diplomatic protection left.

On the second point I can be even briefer. There are a few Swiss

cases which are still now and then found in casebooks and which have been reported in the *Annual Digest*—the *Gschwind* and *Oswald* cases. These precedents make it clear that there is no duty of the Swiss Confederation to protect its nationals; the same principle is, I believe, written into the Swiss consular regulations. I have no recent information, but I believe this is still the rule.

The CHAIRMAN. Now if we can assume that we have gotten the present dismal picture adequately before you, I think that we would like to turn next to the point that was raised by Dr. Domke, which I know that Professor Weston here is straining at the leash to get at, because he indicated his particular desire to talk about this point, namely, if this is the dismal situation, what procedures, either nationally or internationally, do you think ought to be developed here to give more adequate protection?

Professor BURNS H. WESTON. Like every dog that strains at the leash, it is always possible that I will break away and end up in the pound.

I do not know that I can say anything about the precise procedures we might develop or recommend, but I think that we would do well to approach this problem from a policy standpoint. Irrespective of what the law is on the subject, in the United States or anywhere else, what indeed should be our goal from a policy perspective? What is desirable? Do we want to secure protection for nationals who lose their property abroad, or who have other claims against foreign governments? And, if so, do we want to assure that protection through diplomatic means only? Or do we want to promote—as Professor Domke has suggested—increased access on the part of individuals to international tribunals and other adjudicative fora?

These are to me the kinds of questions that we have to ask. And if we say, as I do, that we do want to encourage more individual protection—and for my part, the more adjudicative rather than diplomatic-type protection, the better (without condemning diplomatic protection, of course)—then we are going to have to conceive of some kinds of incentives and controls that will encourage, possibly compel, national governments to protect individuals that are deprived of their property or other values abroad.

Now it seems to me that analogies might be drawn to the general expansion of individual access against governments under, for example, the Federal Tort Claims Liability Act. Of course, you do not always win; an individual does not always win against the sovereign. There are many exceptions, many instances in which one loses. But through common law procedures we have refined those exceptions without destroying the underlying principles of accountability involved. I do not see why analogous applications cannot be made in the area which concerns us now, where the national is trying to bring a claim against his own government for, say, the mishandling of international claims on the part of his government. It seems to me altogether appropriate.

Now I want to make very clear why I would support this position. There is very often a tendency, I think, to assume that we want to

encourage the protection of individual property rights because of some nineteenth-century notion of natural right, a philosophical notion that we all presuppose—most of us in this room, at least. But what happens to those theoretical assumptions when one is not from a capitalist-oriented society? What about those societies—and we are not talking about the United States alone, surely—societies where Lockean conceptions do not necessarily prevail? Do we then still want to encourage the protection of nationals who have claims against their governments? Of course, our answer still must be yes. But why? The reason, I think, is very simple: unless you can instill a sense of confidence on the part of individuals, as well as corporate groups, in being secure in their transactions abroad, the whole international economic process will begin to fall down. Of course, one can distinguish between individual persons who may have claims, human beings like you and me, and so-called corporate claims, insofar as one is concerned to encourage the process of international trade and investment generally. But it seems to me that even when individual persons, not to mention the great investing companies, are subjected to some form of deprivation, it is desirable to encourage their compensation and protection.

So it does not seem to me ultimately to depend upon any particular nineteenth-century conception of property rights, but rather upon a very utilitarian notion, which is that we want to advance the global economy. And for that very pragmatic reason, I think, we ought to advance in every way possible and reasonable the manner in which claimants can secure protection against and through their own governments.

Dr. SEIDL-HOHENVELDERN. I would like to add just two points: There is a further interest. These claims may not, by their nature, be economic claims to begin with. They could be claims for injury, death, or other international torts. And I do think that if the individual concerned can claim compensation from his national state, this national state, on the other hand, will try to recoup, as far as possible, from the faulting states, and therefore, international law will gain also, on another side, because there will be a little bit more enforcement on the international plane; a state which compensated its own national will try, of course, to recover the funds. So this state will be more eager to bring international litigation or diplomatic pressure on the tort-feasor state, and thereby there will be a slight chance, at least, to improve the enforcement of international law in general.

The other remark is this, that on the international level, on a regional basis, the European Convention of Human Rights provides for a guarantee of property rights, and, at least, according to the last cases adjudicated by the European Commission on Human Rights, it would be conceivable that there would even be nowadays an international remedy for a citizen of a European state against his state in a case of a violation of these rights. No such case has so far been brought up, at least successfully, before the Commission. But in theory, at least, this possibility exists.



The CHAIRMAN. I think that this winds up the first half of our presentation here. Now, on the second half, when we talk about the *Barcelona Traction* case, this is an area in which there has not been too much writing, actually, in the United States. There has been a tremendous time lag between the case and the articles, although the articles will start pouring forth shortly; indeed, they already have.

I think that it is unnecessary to state the facts of the case. Indeed, I think that is impossible! (Laughter) So we shall assume that everyone is familiar with them. But let us start out with some of the fundamental observations of the Court.

First of all, with respect to diplomatic protection, what we are talking about here, in general, today, the question is as follows: With respect to diplomatic protection, of course, assuming once it has been extended, as it was in the *Barcelona Traction* case, even if it goes on to the arbitral process, what is the basis of the Court's holding? That there is a distinction between a taking state's—in this case, Spain's—obligation in the area of responding to the diplomatic process, and its obligation—and here I use the phrase of the Court because I want to indicate that I am not sure exactly what it means—"towards the international community as a whole. . . ."

I ask two specific questions here of any member of the Round Table who wants to comment: First of all, is not diplomatic protection an essential ingredient in the protection of basic rights? And, secondly, what about the whole concept of the nation-to-nation traditional process for the enforcement of international law? The fact that there is a greater obligation to the community, rather than to the state exercising the espousal power, presumably on behalf of the community, is something that intrigued me right at the very beginning of the case. I think Professor Weston wants to comment on that, and then we will take other members of the Round Table.

Professor WESTON. I do not know that I have a lot more to add to what I already have said. I do not understand what the Court means in this particular instance. It absolutely confounds me. I do not understand what purported distinction it was trying to draw. The only thing I can derive is that, for some reason the Court saw a distinction between, or assumed that there is a necessary competition between, the interests of a nation-state and the interests of the international community as a whole. That is true, of course; there are many times in which an individual state will not have interests that the wider community will have. But in many more cases than we are willing to concede and recognize, nation-states act in ways that demonstrate that they have very large, very substantial common interests indeed! The most obvious example, one familiar to all of us, is the common interest that all nation-states have in maintaining the freedom of the high seas. We all have an interest in that.

Likewise, it seems to me, in order to facilitate trade and investment, in order to facilitate travel and communication; in short, in order to facilitate all of these processes of peaceful interaction which go on about the world,

every state has an interest in making sure that claims are recognized and acted upon. Of course, depending on whether you are the claimant state or the respondent state, your reactions to the particular incident are going to be different. But otherwise I cannot see that there is much of an issue here. If there is a real distinction that the Court was making, it is, I think, near rubbish or at best obscure.

Mr. CAFLISCH. May I venture a timid suggestion as to what the Court may have had in mind? I think that the Court meant to say that there are certain obligations, state to state, which involve specific rights and duties of these states, and there are other obligations which could be called obligations *erga omnes*. If we want to draw a parallel to municipal law, this distinction would correspond to the difference, for instance, between contractual obligations and the obligations arising out of certain provisions of criminal law. However, I fail to see why the Court saw fit to go into all this.

The CHAIRMAN. I will just interject here, before I call upon Professor Seidl-Hohenveldern, one further clarification: Using the Court's phraseology, the special rights that it puts in the preferred position, I should say, "the basic rights of the human person," it goes on to say that other various rights that may go through the diplomatic process to an individual cannot be the subject of diplomatic protection; they are not in the same category as the basic rights of the human person. Of course, one of the areas of diplomatic protection that we are talking about—the protection of property rights here—is the protection of personal rights that can be very human indeed. So there is, I think, at least, a certain ambiguity here.

Dr. SEIDL-HOHENVELDERN. I think I can answer this ambiguity and also offer at least my explanation of the reason why the Court went into this digression at all. The reason for the ambiguity is that, according to the prevailing attitude of the Court, the Court does not consider a right to property to be a part of human rights. That is in agreement with the new U.N. Covenant of Human Rights, which no longer lists the right of property.

The reason why the Court went into this absolutely useless and needless excursion was merely the fact that the present majority of the Court wanted to make more elaborate amends for the judgment of the Court in the last *South West Africa* case. They wanted to bring in there, through that, that they are against discrimination somehow—and that was the place where they thought to do it.

A further point is that even if we accept this idea, in this same *Barcelona Traction* case, there have been certain interventions by the United States, by the United Kingdom, just in the *general* economic interest. The very effect mentioned as a hypothesis by Weston finds its realization in this very case. Here we have instances of states saying: "We are not concerned with defending the rights of our own citizens in the *Barcelona Traction* case, but if the *Barcelona Traction* case goes against shareholders, this will create insecurity for shareholders in general, and that is our in-

terest to come in." So you could leave this as an instance that community interests could also exist in the protection of property rights.

But the most puzzling effect of this excursion into human rights, as understood by the Court, is paragraph 91 of the Judgment, where, all that the Court seems to give to human rights in paragraph 34 (*i.e.*, this effect *erga omnes*) is taken away again, because in paragraph 91 it says: "However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality." This takes the whole *erga omnes* effect out again and makes the whole exercise even more contradictory and absolutely irrelevant to the case concerned.

The CHAIRMAN. Are there any more comments on this point? If not, let us go on to another issue, which I think is one of the most fascinating issues about the case. In the writings so far that I have seen, the analyses that I have seen, which have been concerned with the actual rules that have emanated from the case, their feasibility, no one has touched upon what I think is one of the most fascinating areas of the case, namely, How did the Court go about searching for the "rule" that it applied? And when I put "rule" in quotes here, I am not just trying to escape the criticism of the policy science people, but I am actually using the language of the Court itself. It in effect said that it had set out to define the general rules of diplomatic protection. And it went out in search, of course, for customary international law, and said that the norms of customary international law were silent. The Court referred to the silence of international law.

Now I would like to raise the key question here: What criteria, if any, did the Court utilize insofar as determining whether there was customary international law, whether it was silent—was it really silent? And what about the various evidences of international law, either called or not called to the Court's attention? Would such evidences, had they been considered, perhaps have convinced the Court to lean in a different direction? Here I completely throw it open.

Dr. DOMKE. The silence which the Court finds as to the existence of customary international law is really the most fascinating issue, in my opinion, of the decision. The Court says in eight lines that it does not consider arbitration practice and lump-sum settlement agreements of the last fifty years of any importance at all; these are special situations which do not create a custom, and therefore, also, not a rule of customary international law.

I personally see in this attitude of the Court the recurrence of an old concept which had prevailed in England from 1609, the famous *Vynior's Case*, when private arbitration agreements were disregarded by courts under the so-called concept of ousting the jurisdiction of ordinary courts, until 1889, when the English Arbitration Act was established. This trend of not enforcing future arbitration agreements still prevails in many countries of the world.

I see in the statement of the International Court of Justice that it does

not find any source of customary international law in arbitration decisions and the lump-sum agreements a kind of expression of jealousy. They are afraid that they will not get enough cases; and they did not get the cases, because the cases for the last fifty years, have gone to arbitral tribunals and other agencies. So they disregard the real source of international law. Let me make one observation: International law, during the last twenty or thirty years, has not been handled primarily in decisions of ordinary courts. Most questions of international law, in many countries, have been decided by agencies—in this country, by the Foreign Claims Settlement Commission and by the Alien Property Custodian; further, in international courts which were established in Germany for restitution questions, for property rights in Germany of foreigners and so on. These decisions are the basis of the development of international customary law, and the International Court of Justice with eight lines does away with all of these things as not being concerned with that development of international law.

I believe, personally, that it is also a failure of the legal profession that it has not considered these tremendous sources of international law, during the last thirty years at least, as of any kind of importance.

Only my friend Seidl has written an article about the dispute settlement under the 1947 Peace Treaties; nobody else, until now, has tapped this tremendous source of international law, and I believe that the real reason why the Court said, "We do not find anything of customary international law" is indeed jealousy; they do not want to have the cases go to arbitrations or other sources, where parties can settle their claims with foreign governments in another forum, especially under the new World Bank Convention on the Settlement of International Investment Disputes.

The CHAIRMAN. Perhaps we should enter a brief disclaimer that Dr. Domke, as most of us know, is the former Vice President of the American Arbitration Association! (Laughter)

Professor WESTON. I would agree with everything that Martin Domke has just said. And whatever remarks I have will be more by way of underlining what he has said than of saying anything particularly original. I agree also that this is one of the most fascinating aspects of this case. I think, further, that it is the most disastrous. It seems to me that the Court's position in this particular instance represents both a major step backward in the development of international law and a major step away from contemporary jurisprudential thinking.

If I may, let me begin by giving a little further advertising to the study that Dick Lillich and I have been doing on postwar lump-sum agreements. We have now gotten together and are seeking to interpret, as already mentioned, something like 130 of these agreements. Why? Our basic reason is simple. If you look at what has been going on in the international claims field since 1945, you find that the lump-sum settlement-national claims commission device has been almost the sole—I repeat—almost the sole means of international claims settlement since World War II. There has been an occasional arbitral decision here and there; but the

vast bulk of postwar international claims has been settled through this particular process. For the Court to ignore, even to discount, this fact; for the Court therefore to assume that there is no international law authorizing shareholder claims, even to assume that there have been no procedures to establish what the law is in the area, is nothing short of extraordinary. Now in holding as it did, if I recall correctly, the Court tendered two rationales: first, that it would not look to these lump-sum settlements because they concerned particular contractual situations fit to specialized situations; and second, because they were born of political pressures. On either ground, therefore, they were seen to be without general relevance.

In the first place, what law is not, by and large, subject to political or other kinds of pressures? Of course, it is a matter of what labels we put on them. But perhaps more importantly, now castigating the Court's so-called *sui generis* argument—and I think I am correct in my review of the lump-sum agreements we have collected—the large majority of those agreements rarely even refer expressly in the texts themselves to the protection of shareholder claims as such. What they usually say is (at least it is true of the French agreements with which I am most familiar) that these claims are being settled for "property, rights and interests" that have been lost. And then, later, it has been up to the national claims commissions which have been charged to distribute the lump sums to determine what is meant by the expression "property, rights and interests." If you look at Dick Lillich's study on British practice and at my recent study on French practice—and I think this can be documented as well in U.S. practice before our own commission, and I am sure that Dr. Seidl-Hohenveldern would indicate the same thing in Austrian practice—it is, I believe, very clear that shareholders have been protected, and precisely in circumstances such as are presented by *Barcelona Traction*.

In short, it seems to me that what the Court has done (quite apart from whether it ought to have referred to municipal law only) is to take an extremely restrictive view of Article 38 of the Statute, which, I would add, contains a provision stating that, in addition to customary practice, the Court is entitled to look at sources that we like to call equity. So the pattern in which people actually have been resolving their claims since the close of World War II reveals not only that there has been a procedure which the Court chose to discount, but that the ignored procedure evinces that shareholders, in precisely the kind of situation that you find in *Barcelona Traction*, have indeed been compensated.

How the Court could have come to the conclusion that it did reach is dumfounding!

Mr. CAFLISCH. The means by which the Court can ascertain the existence or non-existence of a rule of international law are described in the Statute of the Court, as Professor Weston has pointed out. These means have also been repeatedly described by the Court in its decision in the *North Sea Continental Shelf* case, for instance.

I submit that in the present instance the Court has imperfectly carried out the functions assigned to it by its Statute. It has not looked suffi-

ciently to state practice. It has been largely oblivious of arbitral practice. The Court's remarks on these points are extremely scanty, and this might set a dangerous precedent as far as the ascertainment of rules of international law in the future is concerned. I do not wish to speculate on the reason for which the Court disregarded arbitral practice. However—and thus I am unveiling my bias—I do not think that, even if the Court had properly heeded its Statute and its own case law, it would have reached a different conclusion. Perhaps we shall see later why I think that this is so.

The CHAIRMAN. I might say that, regardless of how one views this aspect of the Court's opinion, there is one socially or otherwise redeeming facet about it. It will provide an excellent opportunity for those of us who have to teach the—until now—very dull subject of the sources of international law in international law courses. I think we are all sick and tired of wading through the *Paquete Habana* for the umpteenth time or what have you. And this decision will certainly liven things up, at least I hope it will, come next fall.

Now we come to the next item on our agenda, so to speak, namely, given the silence of international law—using the Court's phraseology—the Court, of course, turns to municipal law. It says it has to refer to municipal law; it is mandatory, in the Court's opinion. And, additionally, it had to be looked at without distortion; in other words, taking municipal law, warts and all. And I would like to raise the question with the Round Table, and specifically here, I know, with Mr. Flemming, who wants to talk about this topic, whether this is the correct approach to construing a suitable norm in this area of diplomatic protection, if international law, we assume for the moment, was silent on the subject?

Mr. FLEMMING. By way of extending some "diplomatic protection" to the Court, I should point out by way of preface that Judge Jessup in his opinion did point out that the Court could only be concerned in this particular case with the state of international law, what the international law was up to 1948. He did not look beyond that.

Although he did not quote from lump-sum agreements and he did not indicate that he knew they existed, and that there is possibly some apology to be made for the Court on why it did not come beyond 1948, nevertheless I think that the basic conservatism of the decision is not only shown in the rejection of the sources that Dr. Domke and Professor Weston have so eloquently described, but to turn away so readily from them, so quickly, and do it with such emphasis, I think, is indicative of just how wrong the decision was.

For example, in paragraph 78, after the Court goes through the process of looking for international law, it simply says: What happens if you find out there is nothing in international law? Well, all it can do is resort to municipal law, if means are available there for furthering the cause or obtaining redress. And the Court uses similar words in reference to why it had to turn to municipal law.

To turn away so readily from its own sources, and not only from the basic sources in the top of the hierarchy, but to turn away from the writ-

ings of learned publicists and jurists is to me a very strange thing indeed. And the Court, I think, has always gotten into trouble whenever it has gotten into the municipal law area. The prime example of this was shown in the earlier stage of the *Barcelona Traction* case, where, I think, for the first time, the International Court of Justice understood the meaning of the private law concept of the stockholder. It struggled with it for many years, and finally came out at the right end in 1964. But after all of the difficulty that it had there, it is very strange indeed that the Court would turn so readily and quickly to it again in 1970.

The CHAIRMAN. Any other comments?

Mr. CHRISTENSON. It seems to me that the Court, in taking this stance by turning to municipal law, is doing much the same thing that the Supreme Court did in *Sabbatino*, and we know how much discussion occurred on that. I can only understand the World Court's opinion by interpreting into it an economic viewpoint, an economic assumption. And that is, that in economic matters, the Court will not assume that there is such a thing as private property rights that can transcend national boundaries in the corporate situation. And, therefore, to place in parity the Socialist economies with those of the capitalistic economies, they turned to municipal law to determine what the economic policy of the particular place is. This would facilitate international trade more readily than if they assumed the nineteenth-century view of protection, namely, to protect the shareholders as if they were private property owners. That is the only way that I can understand the Court's view on this.

Dr. SEIDL-HOHENVELDERN. I think that really the approach used in this case, of referring to municipal law concepts if no other rules are to be found, can be defended. But the objection to it really is the one made by Judges Jessup and Gros, who would say just the opposite to what Mr. Christenson was saying. Judges Jessup and Gros said this is too narrow; only in a capitalistic system do we have corporations in the sense from which we can then draw some general rule. Such a "general" rule really would be limited to only a third of the world. Therefore, they propose to base the right of diplomatic protection not on general rules of corporation law developed by comparative means, but on the damage to the national economy of the home state of the shareholder, and on the right of the home state of the shareholder to protect the part of the national economy which is represented by the interests of this shareholder in a foreign company. This would have been a much more reasonable way of deciding the case, especially of deciding the question of *jus standi*.

The CHAIRMAN. I think that it is now time that we actually get at the Court's holding, and what it says in the *dicta*, and what we can construe by implication with respect to other aspects of this area of law. They are interrelated, of course—both shareholder claims and corporate claims—and, indeed, the Court's discussion of the whole problem of corporate claims with reference to the *Reparations* case raises this.

I would like, first of all, to raise some questions about the Court's holding. When we speak of shareholder claims, I think that the general

opinion is that they are all the same. Of course, they are not: There are shareholder claims through third-state corporations that we have in this case. There are shareholder claims in the corporation of the taking state. There are shareholder claims when the corporation is thriving, when it is on its last legs, and when it is practically defunct, and I suppose that there are claims when it has been laid to rest.

Now what is the Court's holding here? How far does it go? To what extent does it say that states do not have *jus standi* to protect shareholder claims? I will open this up to any member of the Round Table.

DR. SEIDL-HOHENVELDERN. I think that a distinction really can be made. The Court, of course, had no precise reason to rule on the question as to what would have happened if Barcelona Traction, instead of having Canadian nationality, had had Spanish nationality. But if you also read the concurring opinions, especially that of Judge Morelli, you will see that he criticizes the Court for not being of his own opinion. And I think that you could, in a way, at least, plead for the Court, saying that the Court had at least the sense to see that in the case where the state attacking the shareholder rights is the national state of the company itself, then, at least in these cases, the right of the national state of the shareholder to protect the shareholder would exist. The Court does not rule so in so many words, but I think that that can be inferred, on the one hand, from the rather ambiguous language in the Judgment of the Court itself, and, on the other hand, from the fact that Judges Morelli and Ammoun say that the Court has not adhered to the idea that, even in this situation, there should be no right to protect shareholders. Personally, I think that there should be such a right because otherwise, practically, there would not be any chance for the protection of foreign shareholders in a company. And you know quite well that in very many developing countries, the very first condition for an investment is that you can invest only provided that you, first of all, establish a company under the law of the investing country. In the absence of such a rule, even in these situations, the shareholders could not be protected against any illegal actions by the country whose nationality was forced upon them in this way. This would really be the end of the protection of foreign investments because most foreign investments nowadays are made in such covered form.

MR. CAFLISCH. In my view, the Court's holding can be interpreted as follows: First of all, the Court left open the question of corporate claims. Second, the Court quite surely ruled out claims of shareholders belonging to third states. Now I would personally agree with the stand that the Court has taken on this point, for reasons which we will see later, especially in order to avoid concurrent claims. The Court could, of course, have granted a subsidiary right of protection, but the political desirability of such a solution is questionable, as we may see later.

Finally, what do we learn from the Judgment, as far as cases where the company itself is a national of the defendant state are concerned? On this point I would slightly disagree with Professor Seidl-Hohenveldern: I would say that the question was left open, no more, no less, I think. The



Court was perfectly free to do so, because this precise issue was not submitted to it. I nevertheless think that it is unfortunate that the Court failed to clarify the situation.

I would submit that there quite clearly is a right of protection for the shareholder's national state in this case. I would further submit that this right can be deduced from a very long series of arbitral precedents. Whether these arbitration cases were always correctly decided or not is irrelevant. Even an error can generate a rule of international law. And, finally, I would say that this right exists irrespective of whether the company itself is defunct or not, or of whether the national shareholding makes up one percent or fifty percent of the company's capital. I am aware, of course, that this conception is at variance with the views of Judge Morelli and also of Judge Bustamante y Rivero.

Professor WESTON. Dr. Caffisch has just suggested or enumerated a number of the so-called exceptions to what has been characterized as the "company hegemony" rule that comes out of *Barcelona*. I would like to make just a couple of remarks about those exceptions in the light of the facts of the *Barcelona Traction* case, and also one other point.

According to my reading of the case, the Court would extend shareholder protection in at least two instances: first, when the claimant state itself might be incapable of acting; and second, where the company itself would be defunct and therefore without assets, without being an ongoing entity. In both of those instances, it seems to me that a very strong argument can be made, based upon what we can cull from the opinion, that *Barcelona Limited*, indeed, the whole situation of *Barcelona*, met those two tests.

It is my understanding that as between Canada and Spain (perhaps Mr. Flemming can correct me if I am wrong on this) there was no condition of compulsory jurisdiction vis-à-vis the World Court, whereas, as I understand it, such was not the case as between Belgium and Spain, compulsory jurisdiction being possible. Hence, obviously, the absence of a compulsory jurisdiction situation as between Canada and Spain goes a long way toward undercutting whatever capacity Canada might have had in securing adjudication of this particular case.

Secondly, as to the question of whether the company was defunct, I find nothing in the opinion to suggest that there was any real company in existence at all, except possibly on paper. In fact, although I am not entirely clear as to what actually motivated the Canadian Government's abstention, the very fact that the Canadians did not see fit after four or five years to represent *Barcelona Traction* suggests to me that there must not have been very much in the way of an ongoing entity for Canada to worry about; it had no substantial significance whatsoever. The issue, therefore, was probably one of practicality, rather than some abstract conception about juridical existence.

Now an interesting counterpart to the question that the Chairman has posed about shareholder claims is the implication that the Judgment poses vis-à-vis corporate claims as distinct from shareholder claims. And

I would simply tender one thought on that. Granting the separate opinions, many of which, although not called "dissenting," did indeed dissent from the majority opinion, it seems to me that what the Court comes down to saying is that, as long as you have mere incorporation in a particular nation-state, that is sufficient, quite apart from principles of *siège sociale* or—

The CHAIRMAN. Link theory.

Professor WESTON. I am not clear that the majority would have stood for a genuine link theory. It seems to me that it did not. It does not seem to have been concerned, as in the conflict of laws field, with the well-known center of gravity, the contact theory. So it seems to me that the mere fact of incorporation in Canada was sufficient for the Court to find that Canada alone was eligible to bring the claim. It seems to me that that is where its decision ends up.

The CHAIRMAN. Now we are running a little bit behind our self-imposed schedule. So I would like to wind up this aspect of the proceedings this afternoon in about seven minutes or so. If we could have Mr. Christenson talk a little bit about corporate claims, and offer any other observations that he wants to make, then we will go into some general summary remarks about the effect of the Judgment on the area in general, and, of course, its impact on the Court's reputation and standing.

Mr. CHRISTENSON. I would like to respond to the interesting question as to how nation-states are going to treat the case. And this goes again to the question of the holding. I can see one argument for considering the holding to be nothing more than a decision limited to the particular facts with all of the exceptions that were written into it, and indeed I am inclined to interpret it in that way. I think that this is best illustrated by the decision's impact on our investment policy in Latin America. And I think that the Court's decision, if it were interpreted in any other way, would fly in the face of United States practice with respect to the Calvo doctrine.

Suppose the Court's holding were extended to corporate claims, shareholder's claims, between two countries. That is, under the law of many Latin American countries, there is no possibility for a foreign corporation to come in. You have to have a local corporation and a certain amount of local ownership. So investments would be based on corporate ownership in the local corporation. If the holding were extended to deny the right of the national government of the investing foreign corporate shareholder to espouse a claim or protect it diplomatically in Latin America, what, theoretically, would that do to our investment policy to encourage investment in an underdeveloped country under local law? So I think that the tendency of the United States certainly will be to construe the holding in its most narrow sense. And I can see where some Latin American countries might very well construe it in its most liberal sense.

The CHAIRMAN. We have heard some remarks about Canadian practice and, of course, as we all know, there is not only a corporation called "Barcelona," but a corporation called "I. P. C." And I think that we ought

to give Mr. Flemming, if not equal time, at least some brief time to make some observations about it.

Mr. FLEMMING. I first want to say in response, Mr. Chairman, to Burns Weston's observations, that I do not know all the "in's" and "out's" of the *Barcelona Traction* case from the Department of External Affairs' point of view in Canada, and wish to disclaim any access to the many, many file cabinets which, I gather, are full of notes and materials on this case. But I think that, in general, if you can make a summary of Canada's position on this type of claim—and I think that it is still going to be the position after the *Barcelona Traction* decision—it is this:

Canada takes a very flexible view in testing which of its nationals or corporations, or what have you, it is going to protect. And one of the main tests that it would use in a situation like *Barcelona Traction* is: What was the nature of the benefit received by Canada by reason of the incorporation of *Barcelona Traction* in Ontario? If the incorporation was done merely as a tax dodge, or for historical reasons, and there is no substantial economic benefit in Canada, either by way of employment of people or by way of putting of money into the Canadian economy, then I think that a company in that situation would have to tread very carefully and should be given a *caveat*, both by the *Barcelona Traction* case and by other practice in Canada, that it may not be protected, should a situation such as this arise.

Now, the "I. P. C." situation has been mentioned, and I have no idea what position the Canadian Government is going to take on this. I do not think it has taken any exact position publicly. I would expect, though, in the light of *Barcelona*, that it has been examining the nature of the economic benefit which I. P. C. had given Canada. If it is found to be insubstantial, and the political elements of the situation are not substantial, then I would not be surprised if Canada did not espouse the I. P. C. claim.

The CHAIRMAN. I am going to call on Dr. Domke to comment upon the effect of the Judgment upon diplomatic protection, and then we will go into a sort of a grand finale, giving each one of our participants here about thirty seconds to sum up what he thinks the effect of the Judgment will be on the standing of the Court.

First, Dr. Domke, about the impact of the Judgment on diplomatic protection generally and, of course, on foreign investment and the subject matter of the case specifically.

Dr. DOMKE. If you consider the subject is the specific issue that there should be a so-called genuine link between the country whose protection is sought and the company which is registered in that country, it looks very nice and you can consider the criteria which you will use in this concept, but I am inclined to look at the reality of things, and I believe it does not mean anything at all in our concept. International companies are registered in countries like the Bahamas, Panama, Liechtenstein, and others, for reasons which we do not have to discuss, but they are there. They pay their taxes and their duties there. They have no genuine link with

these countries, and I doubt whether, if property of companies registered in the Bahamas or in Panama is expropriated in Venezuela—which is a threatening event—Panama or the Bahamas would ever think about filing a claim against Venezuela, or Panama or the Bahamas would ever think about doing something for a foreign stockholder. So the whole idea of a genuine link in the concept of foreign investments and the protection of foreign nationals seems to me rather an unreality.

The CHAIRMAN. That was an excellent answer to a somewhat different question than the one I asked! (Laughter) However, I think that we will go into our finale here, starting with Mr. Christenson. Perhaps we can blend these things. They are inseparable, of course. We cannot categorize them too much—the effect of the Judgment on protection generally, and the effect of the Judgment on the Court and its reputation specifically.

Mr. CHRISTENSON. My understanding of the Court's decision can only be based on the protection of national economies under their own social and economic sovereignty. The basis for this interpretation was not clearly spelled out. And if, indeed, that was an assumption of the Court's decision, then the craftsmanship of the decision was lacking. Otherwise, the only thing that I can say is that the decision probably will be received with a great deal of interest in many countries, but I do not think that the United States would, for example, treat it with a great deal of respect.

But one must not prophesy too much on this because the tacit assumptions that I think I see in the Court's decision could very well indicate a different trend toward looking much more at a national economy and the links with the national economy to determine protection afforded state to state. So I have mixed reactions to where the decision is going, but I do think that the craftsmanship of the Court is open to question.

Professor WESTON. I am not altogether clear as to what the ultimate impact of it will be. I suppose that my immediate reaction is to say that maybe my students will be right in saying, after reading this case, that there is no such thing as international law! (Laughter)

But I guess that my real reactions are that, given the very strong, albeit concurring opinions but nevertheless dissenting views, on the precise holding of the Court, particularly those by Judges Jessup and Gros, I think that those dissents are going to undercut substantially the impact of the majority holding.

Secondly, as to what the decision does for the image of the Court, I would suggest that there are portions of the opinion which reflect a great inconsistency in the Court's approach to problem-solving here as distinct from, for example, its handling of the *South West Africa* case, and that, as a result, we are going to find ourselves in a very serious quandary about what the Court, as a general jurisprudential matter, is going to be willing to look at in the future insofar as sources of law are concerned. I think that the Court should be roundly criticized not only in this respect, but as well in terms of the damage that it has done to its stature in the process.

The main problem that I see with the Court's decision, however, is its

total and utter failure to deal in any sensitive way with the realities of the contemporary world in which we live, to try to hone its decision according to principles of equity or policy (or whatever words you want to use), and therefore to recognize its responsibility, its obligation, to develop international law. It is not for the Court simply to declare the *lex lata*, least of all in some kind of myopic fashion, but also to cultivate the arts of *de lege ferenda*.

Mr. CAFLISCH. I can promise you some disagreement among the participants in this Round Table.

I think that the Court adequately discharged its duties. I earlier made a reservation concerning the failure of the Court to refer adequately to arbitral practice. However, I think that, on the whole, the Court reached a correct decision; accordingly, that decision will hardly shake the confidence of states, at least in the long run.

I am of the somewhat old-fashioned view that the International Court of Justice is a court of law, and not a court that makes law. And I think that confidence in the Court would be shaken precisely if it made law instead of applying it. People are generally afraid of lawmaking courts, both on the municipal and the international levels. Taking into account the regrettable state of the actual Court, I think that it would be very unwise to have that Court turn to lawmaking.

Little good would have been done had the Court suddenly decided to depart from strict law and to take a "liberal" approach in a case where interests of developing countries are also indirectly concerned. Those who claim that in the past they have been victimized by an international law which was imposed on them by Western civilization would see their past recriminations justified, if, in a case where international law is in their favor, its benefits are denied to them.

Dr. SEIDL-HOHENVELDERN. I more or less concur with what Mr. Caflisch says. It is, of course, regrettable from the point of view of the progress of international law to read in the Judgment that the solution is inadequate to the phenomenon of the holding corporation. But I also see the necessity for certainty of a judgment and sometimes, especially in a situation in which the International Court of Justice finds itself, I think that it is better to strive for a certainty of guaranteed rights rather than for progressive development. I believe it was the better policy for the Court to follow. The Court itself appeared to be not quite satisfied with the situation. That results from the Judgment itself when it says that these are rules which are socially inadequate, but which it has to apply nevertheless.

Dr. DOMKE. I have had my say.

The CHAIRMAN. Here we have a rare lawyer, indeed, who says he has had his say! (Laughter)

Mr. FLEMING. My views are best summarized by the suggestion that I made to the Chairman before we came on stage that the Round Table should be entitled, "Barcelona Traction and Backward" rather than "and Beyond." I have criticized the Court so many times over the last few

years that I am beginning to think that perhaps I am the problem and not the Court. But nevertheless, I think that the problem is still—as it has been in the past—the basic conservatism of the Court, and the fear of even putting its little toe in the water, if you like.

I do not think that the Canadian practice in the area of claims will change as a result of the Court's decision. I think that the Canadian Department of External Affairs might be inclined now to put more pressure on the International Law Commission to revive its twenty-odd-year-old study on state responsibility, and see whether something can be achieved by that route. But, apart from that, I do not think that it will change things.

One point that Professor Domke raised earlier, to which I want to submit an addendum, is the observation relating to the presentation of the case and the lawyers. Judges Jessup and Gros made very interesting observations at one point—which nobody has mentioned here today—that Belgian counsel, in presenting and proving their case, may not have been as adequate as they might have been. And perhaps, you know, we are assuming that everything was perfect in the background when, in fact, it may not have been. So, maybe we should be placing the blame on the lawyers who presented the case, as well as the international lawyers who have not done their homework, for the bad results which I think have come out of it.

Shabtai Rosenne asked the question a few years ago about the International Court, in looking at various other decisions, notably, I think, the *South West Africa Cases*, and said that the preliminary objection cases that the International Court had decided were, in many ways, the best thing that they had done, and certainly this decision on the merits bears out that opinion.

In conclusion, I would like to say, Mr. Chairman, that all of us here on the Round Table are people from developed states, and our comments reflect that. I would very much hope that someone in the audience in the question period would raise the whole issue from the point of view of people from developing states, what are their views on the situation, as reflected by the *Barcelona Traction* case.

The CHAIRMAN. Now we come to the fun, a little participation here from the audience, questions, and mutual bloodletting from members of the Round Table!

Professor ERIK SUY. Mr. Chairman, I am from the University of Louvain in Belgium, and I can assure you that I neither was nor am a shareholder of the *Barcelona Traction Company*!

I think, Mr. Chairman, that I can fully subscribe to what Mr. Caffisch said. There is in fact one difficult point in the Judgment, and this relates to the famous eight lines mentioned by Dr. Domke. The law-searching aspect is very disappointing indeed. But even if the Court should have examined the practice and the international arbitrations, I think that the conclusion reached would not have been different from what it was. I also agree with Professor Seidl-Hohenveldern when he says that in some

way or another shareholders should be protected. And I agree with that *de lege ferenda*, but it was not the duty of the Court to say anything on that.

Let me be very brief as to the impact of the Judgment. I think that the decision of the Court is a very wise lesson, and the Court at the end of the Judgment encourages states to look for bilateral and multilateral solutions. If there is a conclusion to be drawn from the decision, it must be to push forward the efforts of the World Bank and the efforts of the states to solve their investment disputes through the procedures provided for by the World Bank and not to bother any longer the International Court with this type of dispute.

Professor A. A. FATOUROS. Some years ago, an aged English lady sued another English lady for "harboring" her ninety-year-old husband in the Bahamas. Lord Devlin decided the case against the plaintiff, on the ground that there was no precedent for an action where a wife sues another woman; the original common law action involves the reverse: a husband may sue another man for harboring his wife. (Laughter) Normally, the judge allowed, in view of current policies favoring equality of the sexes, the doctrine should be extended to cover the reverse case. But here, since the whole action is outdated and not in keeping with our times, there is no good reason to extend it (*Winchester v. Fleming*, [1957] 3 All E.R. 711). It seems to me that the *Barcelona Traction* case follows very much on the lines of that case!

We have an old doctrine—that of diplomatic protection. All of us who have tried to explain the doctrine in its beautiful theoretical complexities, on the basis, for instance, of those few words in the *Mavrommatis* case, have had bitter experience of how contradictory the whole doctrine is, if seen in terms of modern international law. And, of course, the ambiguity of the Calvo clause, not to mention other problems, follows from the same basic doctrinal inadequacy.

That doctrine now, made to protect individuals who happened to find themselves in trouble in foreign countries, is asked to take care of the problems of multinational corporations, one example of which, by the way, is the *Barcelona Traction* situation. In fact, one of the amusing aspects of the case is the confusion present in the majority Judgment on what to do with one hundred corporations involved in a variety of interlocking shareholdings. The concept of the multinational firm seems not to have reached The Hague yet! The whole problem was dismissed by the Court as some sort of a business deal of the kind respectable eminent lawyers do not deal with—when they are judges, that is; as counsel, of course, it makes up the bulk of their work.

I do not see why the Court should extend such a doctrine to cover something which was really not at all in its original scope. The doctrine is inadequate. It does not fit modern ways of doing things. Professor Domke and, I think, others on the Round Table, rightly suggested that there may be other ways of handling this whole question. It may be possible, for instance, to allow individuals some sort of an international status; that is,

to put them in some respects on an equal basis with states, having as much chance as states have to bring another state to court. If, let us say, Barcelona Traction does not like the fact that Spain may not consent to the Court's jurisdiction, then it has the same choices the United States or Belgium would have: It may declare war on it.

These are real problems; to approach them from the traditional doctrine of protection is not really very helpful. In a way, we are all guilty in that we have tried, in a traditional lawyer's way, to make the old doctrine do a lot of work which it was not really created for doing. What the Court has done then, I would argue, is really to say, in traditional common law terms, that the diplomatic protection doctrine is *stricti iuris* and will not be extended. It is not something that we can or should easily extend to cover a new situation.

It is a curious fact that suddenly everybody wants the International Court of Justice to be creative, especially lawyers from the developed countries who have now found that the Court is insufficiently creative. It is interesting to think how many of them would have reacted if, for instance, the Court had decided otherwise the *South West Africa* case.

There are several regrettable aspects of the decision, obviously. Although I find the final results satisfactory, in a vague way, I do regret that the Court has given new strength to the old concept of nationality of corporations, without any consideration of function, purpose, and such; in fact, going back to formal incorporation as the only criterion. In this respect, for instance, the World Bank Convention has provided consensual ways by which such problems can be avoided.

Two last very brief remarks: One, the distinction between a right against (or an obligation in favor of) a particular party, and an obligation *erga omnes* is the distinction between tort and crime. We have always said that international claims are more like tort claims than like criminal claims. Secondly, as to the lawmaking function of lump-sum agreements, again I regret the Court's position, but it is somewhat amusing to remember that the Court's view as to the value of lump-sum agreements is precisely the official position of the United States. I hope the position will change after Professors Lillich's and Weston's book. But as of now, at any rate, the position as to the partial compensation feature of lump-sum agreements is precisely that the law is not affected; the agreements do not count because they are responsive to special situations.

The CHAIRMAN. I would like to say that we do invite questions as well as statements.

Mr. HOWARD E. HENSLEIGH. I have a statement which I hope to convert into a question! The one thing that I thought about after having read the case was that the Court said that we must look to municipal law. And yet, in my view, the Court did not do a very good job in using the municipal law on which its Judgment must have been posited, in order to reach its own decision. In at least two aspects, I believe this to be true.

In the first place, they indicated that the bankrupt corporation was still alive, and almost fully alive, and fully represented by the curator or the



referee in bankruptcy. I think that the receiver in bankruptcy does as much to represent the creditors of a hopelessly insolvent corporation and no longer actually represents the shareholders, who, when the corporation is finished off, then emerge as real parties in interest. They have direct rights which are infringed when a corporation is forced into bankruptcy.

The other thing which I believe is so is that tax laws and other stimuli force an international corporation to operate as it does and cause many subsidiary corporations to be formed in many different places. Here again, in order to look at what is really going on, you have to protect the real parties in interest. I wonder if you gentlemen would be kind enough to comment on whether you feel that the Court, as represented in the majority, actually did a good job in taking the municipal law as it exists today and utilizing it in reaching their decision?

The CHAIRMAN. Do we have someone who wants to answer that?

Mr. CAFLISCH. Very briefly, I would even go farther. I think the Court did a rather bad job of it, and that Judge Morelli did a rather good job. The Court referred to municipal law in general. Is that a veiled reference to general principles of law recognized by civilized nations? If not, what else is it? I think that Judge Morelli is absolutely right when he says that if you look to municipal law you have to look at the law of the defendant state.

Another question is whether this reference to municipal law suffers exceptions or not. In my view, there is at least one such exception, namely, when the company is a national of the defendant state.

Mr. HOWARD H. BACHRACH. I have three brief questions: The gentleman from France ventured that the decision of the Court would not have been different, even if arbitral practice and lump-sum agreements had been considered. I think that is a debatable question and we will never know the answer. My question to the Round Table is whether the fact that the Court did not consider the arbitral jurisprudence, despite having been extensively briefed by both parties as indicated by the 18,000 pages that comprise the record of the case, is not all the graver, as the problem was squarely before the Court.

My second question would go to Mr. Flemming, who mentioned in passing—I believe he mentioned Judge Jessup and Judge Gros—that members of the Court criticized the presentation on Plaintiff's part. I believe it was only Judge Jessup who raised some questions regarding the non-production of a document. I believe that that in turn raises a very interesting question as to whether the rules of the Court should not perhaps provide when documents should be produced and what is the sanction for failure to produce. As I read it at the present time, the Statute of the Court and the Rules are silent on the subject, but I would like to be corrected if I am wrong.

And lastly—this question goes to Mr. Caffisch who cast doubt on the right of the state of incorporation to bring an action in the Court by espousing the case of the corporation, as distinguished from the shareholders. My question is whether Mr. Caffisch has considered the state-

ment by Judge Lachs, who made the following declaration, which was appended to the majority opinion. He said:

"The Court has found, in the light of the relevant elements of law and of fact, that the Applicant, the Belgian Government, has no capacity in the present case. At the same time it has stated that the Canadian Government's right of protection in respect of the Barcelona Traction company has remained unaffected by the proceedings now closed."

The CHAIRMAN. We have three questions, and we will answer them all very quickly and very briefly, and I will answer the first, having slipped my leash!

First of all, with regard to the arbitral awards, the Court takes two paragraphs and sixteen lines to dispose of the arbitral awards. It took one paragraph and eight lines to dispose of lump-sum settlements. And the lump-sum settlements, I understand, were also before the Court, because they were cited extensively in the opinion by Judge Gros and also in the opinion by Judge Jessup, although in a much briefer exchange in his opinion. These, obviously, were before the Court. They had been briefed. They had been argued. It is fair enough to say that everyone's expectations—and I recall to you that two years ago in one of these very rooms we had a meeting on shareholder claims with a very distinguished audience as we have today, and there was not one person there that anticipated the outcome of the case—everyone assumed that the Court would put its seal of approval on shareholder claims, based upon the vast amount of arbitral practice. As Professor Baxter said in an article several years ago on the codification of international law, surely, this is one of the areas of international law, with the exception of the compensation question raised by Mr. Fatouros rather briefly, that is "ripe" for codification. And I can only say that I find it very surprising indeed that both lump-sum settlements and arbitral awards got the back of the hand from the Court.

Now with respect to the second question on documents and the Court's Rules, directed, I think, to Mr. Flemming, I am not at all sure that we should answer this because there was a panel on the Court and its procedure yesterday, but perhaps, since it was directed to Mr. Flemming, I will give him the opportunity to answer if he wishes.

Mr. FLEMMING. Certainly the criticism that I know that Judge Jessup did make (I may stand corrected on whether Judge Gros made any comment on the Belgian counsel or on the presentation of the case) was not necessarily a remark directed against counsel. As the questioner did point out, the production of one particular document, and also the whole method of presuming ownership of shares and so on, was the issue.

I have never practiced before the International Court, and perhaps, with its dwindling business, I will never get an opportunity! But it certainly does seem to me that there should be a discovery of documents technique such as is available in municipal law to prevent this sort of thing from arising in the future, if it did, in fact, cause the difficulty that Judge Jessup seems to attribute to it.

Mr. CAFLISCH. The third question related to the correctness of Judge

Lachs' statement to the effect that the decision presupposed analysis of the nationality of certain companies, particularly of Barcelona Traction. There is also a declaration by Judges Petré and Onyeama saying exactly the contrary.

Personally—I do not know exactly the views of other participants in this Round Table, and I do not intend to presume—I would agree with Judge Lachs. If it were otherwise, how could the Court have left the question of protection of shareholders of a company which is a national of the defendant state?

Judges Petré and Onyeama, while making this declaration, went along with the Court. Logically this would seem to imply that for them shareholders' interests are not protected at all. This is rather surprising when one considers Judge Petré's earlier publications on this topic.

Mr. GEORGE HOUSE. To return to the *Aris Gloves* situation and away from the *Barcelona* case, I would like to make a few comments regarding an individual's right to expect his government to be obligated to espouse his claim or to protect that claim. I think that there are two distinct situations which the Round Table has not mentioned, and which were not mentioned in *Aris Gloves* itself:

The first situation, one in which I think the government does have a definite obligation, or, in our terminology, a Constitutional obligation to pay the *Aris*-type claim, was suggested in the nineteenth century by Daniel Webster. He suggested in a discussion on the *French Spoliation Cases* that when the Government had encouraged reliance upon diplomatic efforts instead of self-help, as our Government did in that case, it should be obligated to preserve the claim. In an executive address by President Washington it was stated to those claimants in the *French Spoliation Cases* (these were shippers who had lost their ships by the illegal confiscations of French privateers) that "You should not arm your ships"—this is in 1793—"Do not arm your ships. The government will protect your claim and espouse that claim and will assure you that you will be paid for your losses. We do not want you to breach the Treaty of 1793." Now according to this executive agreement, none of the merchant marine of the United States either armed their ships or tried to instigate war in any fashion with the French Government. They grudgingly but peacefully surrendered their ships.

When a mission was organized and sent to France to prepare a treaty in 1800, that committee was given specific directions that its first and principal obligation was to insure the payment of the claims of these American shippers. When the treaty was signed, this specific obligation was completely abandoned, and Congress, pursuant to an amendment by Napoleon, just made an agreement which would trade off the French claims for the American claims. Consequently American claims against France were destroyed.

Now in this situation, I think, when the claimant is acting upon a statement of his government that it would protect that claim, he does have a definite right and there should be an obligation on the part of the gov-

ernment to compensate that claimant. This situation, I think, is relevant today, especially in the American tuna boat subsidization of Ecuador, where we are continually paying Ecuador fines for the tuna boats which they take. It is very possible that in this coming year, with the return of the world's largest tuna boat (I forget the name of it) to those waters for the third time, considering Ecuador has threatened to take this boat and keep it for good, there will arise a similar situation.

And what will the United States Government do in this situation when it has not a claim of ten or thirty thousand dollars, but a claim of forty to fifty million dollars? Will it continue to pay the claimant? Or will it extend to this situation the *Aris Gloves* doctrine and say that there is no Constitutional right to payment? I think that it is a very relevant question.

And the second situation which I think should have been viewed by *Aris Gloves*, and in which *Aris Gloves* falls in my opinion, is American investment or foreign investment overseas, in which the Government has in no way given its assurance that it will insure the claim. The *Aris Gloves* Company went to East Germany and initiated its business there with no approval and no sanction of the Government, other than just the general sanction that the American Government likes foreign investment. In this situation, I do not see that the Government should have an obligation to compensate that claim, other than a moral obligation to help out the citizens of this country in a gratuitous manner.

The CHAIRMAN. Well, thank you very much, Mr. House, for two reasons: one, we appreciate student participation in substantive sessions, as well as in business meetings; and, secondly, for getting us back to *Aris Gloves*.

I would solicit Mr. Christenson's remarks.

Mr. CHRISTENSON. I regret that in my earlier comments I did not go into the *French Spoliation Claims* as well as you did. But I did try to indicate that we do not know where the law is going to come out under the Constitutional doctrine you proposed. In the *Gray* case there was an advisory opinion which the concurring opinion in *Aris Gloves* argued should have been considered more forcefully, more in the light of precedent than simply to pass it off as advisory only, as the majority did.

Now I happen to think that there is an area that will be protected Constitutionally under the Fifth Amendment. In my judgment, it will not be extended to the waiver of claims, however. It seems to me that this would arise when an actual executive agreement has occurred to take property that is vested under the law of the foreign state. I can see that as a makeway fact situation.

I put the question one time to an Assistant Legal Adviser of the State Department: "What would happen," I said, "if the United States and France, for example, entered into an agreement that property of an American in Paris would be taken for American use in turning it into an embassy?" I maintained that that would be an unconstitutional taking, or taking against the Fifth Amendment for which the Court of Claims would give compensation. And he said, "Well, we would take care of

that very easily by entering into that arrangement and then having the claim come and then waive the claim."

So you may be right! It does raise a question which is really unsettled at the moment.

Mr. H. GERALD MALMUD. I would like to address myself to the "Barcelona Traction and Beyond," particularly from the viewpoint of someone who acts as counsel to people who want to invest abroad and who are faced with many uncertainties, and has the difficulty of advising them as to the safety and security of their respective investments abroad. And I would appreciate any suggestions or recommendations of the members of the Round Table as to what counsel perhaps could try and do in the drafting and structuring of the agreements, particularly when, as was mentioned by one of the Round Table members, as a precondition to the foreign investment, the taking country or the local country requires you to set up a local national corporation, and for those attendant difficulties.

The CHAIRMAN. Who wants to respond to that?

Dr. SEIDL-HOHENVELDERN. It is, of course, a difficult bit of advice to give, because the best advice, of course, would be to stay out of that country! The next best and most useful advice, of course, would be to try to get an agreement from this country that it submits to the World Bank arrangements and thereby waives the right to invoke the nationality of the corporation.

Of course, if the country welches on this promise, nothing can be done. But that is about the best advice that you can give. And it may also be interesting to see that this is advice which has been given the blessing of the World Court.

Maybe this is something which may be quoted in mitigation, so to speak, of this Judgment. The Court, in several passages of the majority opinion, referred to the possibility of obtaining additional protection for shareholders by making such bilateral agreements. This is important in itself. It has not even been contradicted, apparently. So we now have here an argument against developing countries, which very often go against these contracts by saying "These are neocolonialist exploitations," and so on and so on.

So then you can say now that such contracts have the blessing of the Soviet judge and the Polish judge, and that in their eyes this is now a fair means of doing business.

Dr. DOMKE. In all the principal trading countries of the Western world, you now have the possibility to insure your investment by guarantees. We have extensive case law on this. And, of course, the host country has to have a guarantee agreement with your own government, and then you are protected by certain provisions of this country. So if the company will pay something for the risk, we can be protected to a certain degree.

The CHAIRMAN. I would like to say something, by way of addition, on that point. The question, of course, presupposes that this case will have substantial impact and impact indeed it already has. However, we have

also had some evidence, coming from Canada, that Canada is not going to pay too much attention to it. It will look at other tests, more traditional tests, perhaps, with respect to corporate claims and shareholder claims.

The impact on the Department of State will be absolutely nil. They are not going to pay any attention to this. This is the informal word. And obviously, of course, it will be advanced, and I assume that it ultimately will be, if it has not already been advanced, in one connection or another, with the I. P. C. case, although, apparently, the Peruvians have been rather slow to pick up the point, probably because the opinion is so long! (Laughter)

Sooner or later it will have an impact, but I am quite sure that the impact will not be as great on the law in this area as one would suppose, because, as Professor Weston has already pointed out, and as I tried to emphasize once before, you can offset this opinion by a vast flow of decisions, reaching back for many years, with respect to the arbitral tribunals, and lump-sum agreements, and various other things, like domestic legislation in the property control field, vesting, and what have you, that we have not mentioned today.

Mr. CAFLISCH. I have just two points to answer the very wise advice given by Professor Seidl-Hohenveldern and Dr. Domke, namely, that is, avoid the Calvo clause, and avoid any triangular relations. That is always best! (Laughter)

Professor WESTON. I do not want to address myself to the question that was just asked, having already spoken to it somewhat. But there are a couple of points that have come up in the course of our discussion that I would like to get clarified for myself.

First, I believe Professor Suy and also Dr. Caffisch have indicated, as I understand them, that even if the Court were to have examined the arbitral and diplomatic practice since 1945, it would have come out holding the same way. What I would like to know from either of them is, by what rationale? Would it have been on the same reasoning? Or would they say that it would have come out the same way because of, say, the conclusion reached by Judge Jessup that Belgium did not prove the existence of national shareholder interest? Or would they say that it would have come out the same way because customary practice and arbitral procedures, notwithstanding recent developments, evince a norm that is consistent with the actual holding?

The second question that I have spins out of something that Professor Fatouros suggested, and it was brought up also by the Court, although I do not recall whether in the majority opinion or one of the concurring opinions. The suggestion is—I think Brian Flemming also questioned the point—that to criticize this case is, in effect (the majority holding, that is) to go against the interest of third-world countries.

I challenge that view. I do not think it is correct. For reasons that I indicated earlier, I think that all states have a common interest in protecting claims of these kinds in the interests of a truly productive inter-

national economy. I do not think that because you are a third-world country or any other country necessarily makes a difference in this particular respect. Just because it may appear to be at least superficially against third-world interests to protect shareholder claims, I do not see that it necessarily is. I see no inherent antagonism.

I would like to get a response, if I may, to both of those questions.

The CHAIRMAN. Let's put the first one to Professor Suy, and the second one to Professor Fatouros.

The worm has really turned! The Round Table members are asking the audience questions! This is the free flow of ideas that the Society is all about.

Professor SUY. Mr. Chairman, Professor Caflisch has written a book on it. I have only read it! (Laughter)

Mr. CAFLISCH. Writing a book does not necessarily bestow ultimate wisdom! I found that state practice, such as the *Lewis* and *Romano Americana* cases—and I would not go back to 1945 but at least to the 1930's—is singularly inconclusive. I also came to the conclusion, wrongly perhaps, on the precise point which the Court had to decide, that lump-sum agreements are by no means uniform.

I do admit that treaties can be evidence of customary law, but the conditions which must be met are very stringent: There must be a near uniformity of treaty rules; moreover, it is impossible to prove the existence of a customary rule only through conventional law. There has to be something else.

Professor FATOUROS. I did not say, of course, that one should not criticize the case: First of all, because there is a lot to criticize in it. And secondly, because this would deprive too many of my colleagues of an occupation for too long a time! In fact, as our Chairman suggested, this is a good case to use in class. As you know, you need in class not only good cases, in the sense of well-decided cases, but also cases where you can make nice easy points in criticism.

On the question of the third-world aspect, it is true, of course, that the whole question came up very obliquely and rather strangely in this case, because, as one of the Judges pointed out, this case does not really involve third-world countries.

Mr. FLEMMING. Judge Jessup thanked God that it did not involve third-world countries!

Professor FATOUROS. And by the current definition, neither Spain nor Belgium would fall in that category. However, the decision may be seen in such terms if we look at the motivations of the Judges, as some of the members of the Round Table did. As Dr. Franceskakakis has recently suggested, you had in this case a very interesting combination of the strict constructionists, on the one hand, who, following the same sort of reasoning they used in the *South West Africa* case, said "No. The Court is not going to move one inch ahead in changing established law!" and, on the other hand, some others who would have no compunction at all about changing the law, if they thought it needed changing, but in this particular

case felt that the decision the other way fitted their interests and opinions much better.

The CHAIRMAN. It depends on whose ox is being gored.

Professor FATOUROS. Well, this is a very well-known legal position, as lawyers would say. (Laughter)

As to the third-world interest in having cases decided on the basis of the doctrine of diplomatic protection, I would beg to differ with Professor Weston. I think that this doctrine is not, at this moment, alive enough, fertile enough, if you will, to provide answers to the multitude of questions that arise. There are various central ambiguities to it, which are or can be avoided as long as the cases are exceptional, as long as there are few cases, and as long as the persons involved are individuals. The moment power comes into play, where power politics by corporations are involved, the usefulness of the doctrine of diplomatic protection begins to dwindle. The cost of using it, and starting a kind of Ptolemaic, pre-Copernican structure of epicycles in order to find some way to resolve the ambiguities, becomes in the end, too high. This does not mean that there should be no procedure by which such questions would be decided, although I am not at all convinced that judicial methods are necessarily the best ones.

If we are going to be serious about bringing the problems of foreign investment under international law, then let us extend to foreign investment the same kind of reasoning that we have applied to interstate relationships, where judicial settlement of disputes is exceptional, and is clearly not the rule. There has always been a kind of picking and choosing in this connection with respect to foreign investment.

Dr. DOMKE. I want to say one word of clarification: Some gentlemen are of the opinion that if the Court had considered arbitral jurisprudence and lump-sum settlements, the decision would have been the same. But the reason for this statement is a wholly different one, because under international law the so-called "continuity rule" has to be observed.

The injured person has to be a national of the state which has to protect him up to the date when the claim will be settled, and Belgium was obviously not in a position to prove that the originally injured shareholders were the same at the date when the claim was presented. This is the real reason why the decision would probably have been the same, not for legal reasons, but for factual reasons; the real reason was continuity of nationality. But to prove your claim is still the prevailing rule.

Mr. GÖSTA WESTRING. I have worked with the Swedish International Development Authority as a legal adviser for some years and am now deputy director of the Department for Financial Assistance. I am also an alternate on the Board of the Swedish Export Credit Guarantee Board, which is entrusted with the Swedish international investment guarantee scheme.

In connection with the investment guarantee scheme we have discussed one thing which is also pretty much discussed in the United States, as far as investment guarantees are concerned, and might be of interest



to the discussion here on the third-country or the Third-World point of view, and that is the linkage between an investment guarantee given by a government authority to one of its nationals and an investment guarantee treaty or an investment protection treaty between the guaranteeing country and the host country for the investment.

There is a slight nuance in the outlook on this problem between Sweden and the United States in the sense that Sweden would not want to link the international investment guarantee scheme with investment protection agreements or investment guarantee agreements which institute, as a normal procedure, subrogation of the guaranteeing institution in case of an expropriation of the investor's property. This means that we would be very choosy in espousing the claim of the investor. Further along the line suggested by Mr. Flemming, I think it would require a clearly national interest before Sweden ventured to step in on the side of, or instead of, the investor, supporting his claim against the expropriating country.

I think that this just goes to show that the problem here is really a political one, in my view. And I think that the principle of diplomatic protection should—as Professor Fatouros has suggested—be expanded carefully into this entirely new setting of international investment.

MR. WILLIAM L. GRIFFIN. Two *ad hoc* international tribunals have recognized—one by holding and one by dictum—that the doctrine of continuity of nationality is not applicable to cases in which the injury is a continuing one and constantly accruing. In other words, the claimant state has standing to espouse a claim of its naturalized national for injuries continuing after such naturalization, even though the respondent state's liability-creating conduct began before such naturalization. In at least three such situations the U.S. Department of State has interposed to obtain redress for injuries sustained subsequent to naturalization. I would like to ask Dr. Domke if he visualizes any factual situation in which this continuing injury doctrine might be used for the benefit of stockholders.

DR. DOMKE. I do not believe that it could be acceptable under the prevailing practice of international law.

THE CHAIRMAN. Well, it has been ten years, Bill, since you wrote your article on continuity of nationality! And I think that perhaps you have got enough ammunition in this case to write another!

I would like to say thanks very much for the members of the Round Table coming here today and participating. The discussion was informal, but the preparation, I can assure you, was intense. I would like to thank the members of the audience, too. We had expected a very small audience. We have had an audience here in size and in interest that we certainly did not expect.

I am not quite sure what words, in the nature of a Papal blessing, I can bestow here. Our topic, of course, is "Barcelona and Beyond." The "Beyond," of course, recedes into a pall of smog in this area. I would only like to say one final word of my own:

It does seem to me that a lot of the criticism of this case is very valid criticism indeed insofar as the Court's approach to the law is concerned. It seems to me, especially, that the Court lacked judicial craftsmanship, and I do not gain any solace by saying that in this case the Court has demonstrated the same rigidity that it demonstrated some four or five years ago, only the shoe is on the other foot now; it is the Western nations, perhaps, that are unhappy. Bad decisions are bad decisions.

It seems to me that the Court four or five years ago made a very unfortunate decision in a very big political case involving South West Africa. It seems to me that the Court here made a very bad decision, and that it made it in a way which did not constructively contribute either to the development of the law in this area or to the confidence that lawyers and governments must have in the International Court. It is well known in this country and in Canada that one of Canada's reasons for the Arctic pollution legislation was the fact that it did not trust a referral to the International Court of Justice, because it did not think that the Court, in the light of the *Barcelona Traction* decision, would have come out with a decision, whether for Canada or for the United States, that was properly thought through and responsive to the need of contemporary international law.

I think that a lot of the criticism that will emanate from the pages of the periodicals against the decision will be criticism, not just from a Western viewpoint or a foreign investment viewpoint, but in a certain degree from unhappiness that the Court has demonstrated that it lacks the very basic, fundamental approach to the analysis of problems, to the utilization of data before it, and to the demands of the contemporary flow of decisions that we here call "diplomatic protection."

And, with that peroration, I call the meeting adjourned.

Whereupon the meeting adjourned at 4:50 o'clock p.m.

## ANNUAL DINNER

STATLER-HILTON HOTEL

Friday, April 30, 1971 at 7:30 p.m.

## TOASTMASTER

JOHN NORTON MOORE

*Chairman, Committee on the Annual Meeting*

## SPEAKERS

Professor HAROLD D. LASSWELL

*President of the Society*

The Honorable JOHN N. IRWIN II

*Under Secretary of State*

## AFTER DINNER

# INTERNATIONAL LAWYERS AND SCIENTISTS AS AGENTS AND COUNTER-AGENTS OF WORLD PUBLIC ORDER

*By Harold D. Lasswell*

## *Introduction*

The evolution of world public order is a slow and fluctuating progress. A question of direct interest to us is whether on the whole international lawyers and scientists have acted as agents or counter-agents of this evolution. Have we thrown our weight on the side of at least minimum public order? Whatever our past has been, what objectives and strategies are appropriate to coming years?

The present is an auspicious moment to raise questions about the past and future. We habitually think about time in complex symbolic terms. A few decades ago we were using "century symbolism" to distinguish "twentieth-century man," with his accelerating tempo, from his nineteenth-century predecessor. Today, as the year 2000 approaches, we seem to be acquiring a "millennial identity." When we glance backward, we relate ourselves once more to the year 1000 A.D. when Europe was slowly recovering from the fragmentation that followed the eclipse of the Roman Empire in the West. In those days the hope or the fear was that the year 1000 would bring the end of the world and usher in the Christian millennium. In our day apocalyptic thinkers wonder whether population pres-

sure, resource dissipation, and nuclear annihilation can be deferred for another thirty years.

An advantage of the millennial unit of ordering time is that it provides a convenient means of positioning ourselves in reference to the great turning points in the global history of man. One of these turning points marked the appearance of a new category of actor in human affairs. In the anonymous sea of tribal cultures and wandering bands "civilizations" arose. As one archeologist put it, the "invention" of true cities occurred rather suddenly in the third or fourth millennium B.C. in the river valleys of the Nile, the Tigris-Euphrates and the Indus.

At once civilizations became the principal units of the political process. The civilizations contended against invading tribes. They might triumph; or, as with Egypt, in contention with the Hyksos, or China, in contest with the Monguls and their predecessors, the civilized empires might turn defeat into victory by incorporating tribal rulers into civilized styles of life. The civilizations might contend with one another, as in the cockpit of the Near East, or split into battling units as in China during periods of contending states.

In millennial perspective another turning point was when the "world community" emerged from an "aggregate" of areas having little or no contact with one another. Since the overseas expansion of Europe, which began half a millennium ago, it has been appropriate to recognize the existence of a "world community." The world community is not, and never has been, a "world society." A world society implies a universal system of at least minimum public order. The presence of public order implies institutions of power, and a network of institutions other than power for whose protection and fulfilment law is effectively used.

What would it be like to live in a world of at least minimum public order? The expectation would be generally accepted among rulers and ruled that wars (large-scale organized violence) would seldom, if ever, occur. All controversies would be settled by peaceful procedures in the framework of common policy. The implication is not that a super-centralized structure is essential, but that peaceful procedures of conflict resolution are protected by promptly mobilizing the popular support and the police forces required to safeguard their use. Large-scale violence simply becomes an unthinkable and intolerable option of public policy.

It is unnecessary to dwell on the equivocal character of the contemporary situation. We can draw no more than limited reassurance from the allegedly permanent nuclear set-off between the super-Powers. Certainly we cannot rely on nuclear proliferation to obviate the occurrence of mistake, persecutory paranoia, or acts of desperation. While welcoming any step toward nuclear limitation, we are bound to acknowledge the persisting expectation of violence in world affairs.

### *The Early Equivalents of Lawyers and Scientists*

And what of the rôle of lawyers and scientists in the fluctuating movements toward or away from at least minimum world public order? Per-

haps our present and prospective rôle can be better understood if we identify our counterparts in pre-modern and modern times, and try to cast a rough balance sheet of aggregate influence.

Although highly differentiated careers were relatively few in early tribal societies, it is not difficult to recognize a distinction between what we call "professions" and "occupations." Members of an occupation engage in a particular activity, and command the limited body of knowledge required for its exercise. A professional person is perceived as possessing a relatively comprehensive map of man and nature. Hence a *professional* rôle combines general *enlightenment* with specific *skills*.

In tribal societies there were masters of the ceremonies undertaken on behalf of the purposes of the whole community, such as planting and harvesting crops, or launching military expeditions. There were also persons who used particular spells or chants in aid of individual purposes, such as overcoming sterility or having a lucky hunt. The masters of the ceremonies intended to propitiate or coerce the higher spirits and forces were perceived as men whose knowledge of the stars or of traditional lore was sufficiently comprehensive to provide reliable guidance in the choice of the dates and the strategies on which depended the shaping of values common to the tribe.

Were our professional counterparts in early tribal societies agents or counter-agents of a more comprehensive (or humane) system of inter-tribal relations? No satisfactory reply can be given. We can, of course, project into the past the rôles that have been identified by modern investigators in surviving tribal cultures. These may include the conduct of ceremonies that sometimes enable segmented societies to define and act to protect common interests. In any case the world community has been most affected by the rise of urban civilizations; and records are sufficiently abundant to identify and evaluate those who performed a rôle equivalent to lawyers and scientists.

Lawyer-equivalents served for instance on negotiating missions among early Near Eastern Powers. If we are to appreciate the full significance of these treaty negotiators, it must be recalled that they were operating in an intellectual world dominated by militant theologians or metaphysicians. The treaty-makers were themselves priests or at least acceptably devout. What made them distinctive was the capacity to lay aside intolerant denunciations of the unbeliever, and to make use of the rhetoric and procedures of offer and counter-offer. In the process a definition of common interest could arise in the larger community. The treaty-makers mediated between the abstractions of the dominant metaphysical or theological "doctrine" and the specific circumstances of the conflict to be resolved. They interposed a body of prescriptive statements or "formulas" between the high-flying abstractions of doctrine and the complexity of concrete instances. The formulas are middle-level prescriptions that specify the general doctrine in some detail, indicating the contingencies to which they apply, and the sanctions to be invoked. We identify "formulas" as part of the "content" of legal communication. The proto-jurists and lawyers

not only invented and manipulated symbolic "content." They asked questions and engaged in other "procedures" that conferred distinctiveness on their rôle.

Such skill in the management of meaning is very familiar to jurists and lawyers in our day. Did these techniques contribute to, or block, recognition of common interests and the advance of public orders in the regions occupied by the early empires? The voluminous treaties and contracts of record suggest that the consolidation and possibly the extension of partial public order were frequent, if not inevitable, consequences of what was done. Although documents are scarce, it is probable that in many instances lawyers avoided a breakdown of negotiation by beginning with modest points and widening the scope of agreement. A technique that we identify as legal was to detect contradictory assertions of fact that could be appropriate take-off points for empirical inquiry.

It was not, however, the counterparts of jurists and lawyers who took the most decisive steps toward supplementing or supplanting traditional world views by developing the full significance of empirical inquiry. This was the work of the precursors and equivalents of scientists in the physical, biological and cultural realms.

Early scientists, like early lawyers, had the task of connecting the norms of theology and metaphysics with observable events. In ancient Chaldaea, for instance, towers were built to facilitate the examination and recording of the motions of celestial bodies. The significance to be attached to these motions was asserted by the doctrines of the prevailing theology. The observers, too, were priests; but their distinctive rôle was to learn and to use "procedures" of observation and recording. Hence they became more aware than others of the difference between an initial set of expectations about the stars and the corrected record of how the stars actually moved when they were observed with care and competence.

Even as the priests who were acting as jurists and lawyers focused on controversy, the priests who were acting as scientists specialized in the act of disciplined observation. It is not surprising to find that the observers began to diverge from any fellow priests who would deny an observation in the name of an alleged revelation or a traditional dogma. The priests who insisted on rejecting the evidence of observation were elevating a difference of method to a platform of social and political rivalry and conflict. Those who were devoted to the dogmas and rituals of doctrines affirmed by faith also found themselves more or less alienated from lawyer-like colleagues who were able negotiators with unbelievers. Whether we examine the long history of public order and disorder in China, India or the Mediterranean, we come across indications of the tensions that separated the dogmatist, the negotiator, and the observer from one another.

These professional men of knowledge and skill seldom, if ever, appeared as "pure" dogmatists, negotiators or observers. In the past, as in the present, they occur in every conceivable combination with one another, and with every thinkable consequence for the exacerbation or alleviation of transnational conflict. In conventional perspective the chief priest of a

state church might be expected to be a dogmatic defender of the faith who has no common ground with the chief priests of rival establishments. However, a regionally unifying rôle might in fact be played by the prophets and priests of the polytheistic religions in the name of which the first great empires were consolidated. The god of a victorious ruler was perceived as elevated to suzerain status over other tolerated gods.

In contrast historians usually recognize the destabilizing influence of those who identified with the spread of monotheistic rather than polytheistic faiths. "Thou shalt have no other gods before me" is an imperative that takes root as a personal and small-group attitude. It may be extended to the world of overt action by militant leaders who translate it into an imperialist demand for total loyalty and for total rejection and annihilation of rival centers of authority and control.

Multiple consequences also follow the invention and spread of metaphysical systems. Metaphysical assertions are relatively "impersonal" and avoid "personifications." Some faiths, like Buddhism, function at different intellectual layers, providing a pantheon of gods and devils for the masses and a metaphysics of fundamental energies for the subtle few.

There is a sense in which the scientific view, when fully elaborated, is neither theological nor metaphysical. The scientific outlook is exploratory and subject to the discipline of procedures of empirical observation.

Lawyers and scientists have often been in trouble with dogmatists. The lawyer who treats with the unbeliever is vulnerable. So, too, is the scientist who reports an unwelcome empirical fact, or reveals his underlying tentativism about past and present cognitive maps. Badgered by true believers, the individual may be perpetually driven to reaffirm his faith in conventional doctrines. Of more importance, however, is the fact that jurists and scientists have sometimes made common cause against their tormentors, and formulated bodies of doctrine that would increase their independence of colloquial convictions. The most persistent of these intellectual initiatives, and the one offering most promise for the future of the world community, aligns lawyers and scientists with one another in support of universal and humane conceptions of world public order.

One of these conceptions is a version of natural law that derives the natural order from divine purpose or metaphysical forces, and specifies that the realization of a world order of human dignity is included in the system. Another conception postulates a scientific model that allows for the potentiality, not the "inevitability" of such an evolution. The result is to commend to one and all identification with the dignity and destiny of man; not simply with parochial man, as exemplified in a particular tribe or local civilization, but man as a living species whose evolution continues.

The scientific view goes back a long way. In Western tradition the most complete statement was by the pre-socratics of six-century Greece. The norms of institutions were perceived as interacting with the whole social process. In the words attributed to a disciple of Anaxagoras "right and dishonourable exist not by nature but by custom and law." At the same time Mo-tzu, the Chinese sage, was drawing certain inferences for human

identity, interests and politics. "When everyone regards the states of others as he regards his own, who will attack these states? Others will be regarded as the self."

### *Universal versus Parochial Interests*

How does it happen that, despite a long history, this emphasis on the larger self has not been more effectively supported by the weight of the legal and scientific professions? An answer is implied in the account that we gave of the rôle of the lawyer-equivalent and the lawyer. The emphasis has been on client-serving; and, since most of the desirable clients (in terms of money, power, respect, and opportunity for the exercise of skill) are elite members of the established order, the lawyer tends to serve the establishment. He tends to reflect rather than to affect the complex balancing of territorial and pluralized forces in the world community. Client-serving by the scientist, as in the case of the lawyer, means that his knowledge is used in defense of the structure of the world community as he finds it. He serves special interests in a divided and militant world arena; hence he perpetuates the system. This is true even though, in principle, scientific knowledge is universal.

How do we explain the paradox of universalizeable truth captured by parochial interests? *Universal statements and universalizeable operations are parochially introduced.* An innovation is first communicated to an audience whose members are localized in time and place. Immediate acceptance and application depend on relatively local expectations of advantage. In turn these are conditioned by their relationship to the world arena where the institution of war, including the expectation of violence, is entrenched. The degree of support that is forthcoming depends in no small measure on the degree to which local interests (political, economic, and so on) perceive that they can defend or aggrandize themselves. Universalizeable knowledge is adapted to serve national, imperial, and related purposes. As a result world public order has not, as yet, been fundamentally transformed by scientific knowledge or by the impact of professionals who clarify the common interests of mankind (even in survival).

### *The Emerging Emphasis on Common Interests*

However, there are grounds for asserting that something new is on the scene. The growing interdependence of the world community follows a curve of explosive development. Not only the nuclear physicists who toiled and brought forth the bomb have known "sin." Many biologists are aghast that genetic engineering exposes them to unparalleled temptation. In a word, many scientists are in the midst of an intellectual reorientation. They are newly motivated to re-enter society, not only as *client-servers*, but as *citizen-participants*. Scientific societies evince an unprecedented, if belated, concern for examining the social consequences and policy implications of scientific knowledge, whether the knowledge relates to the physical, the biological or the cultural realm. Scientific bodies appoint commissions on public affairs; and the scope of those committees is



larger than a simple mandate to hunt more money for scientists. New science and policy magazines are edited and circulated in the scientific community. Seminars and courses in public policy formation and execution are proposed as part of professional and post-professional training. Proposals multiply for world universities.

Some members of the legal profession—especially those who are concerned with transnational affairs—are moving along a parallel track. A rising generation of international lawyers reaches beyond the boundaries of a training designed to fit them for a relatively passive client-servicing rôle. They are more willing to examine legal formulas and procedures in the context of an interdependent reality and to identify the common interest.

The time is indeed propitious for considering the adequacy of steps such as those we have taken through the American Society of International Law, as one of many important professional associations, to provide a basis, not for abandoning the client-serving rôle, but for enhancing the effectiveness of its parallel impacts, while playing the more directly responsible rôle of citizen-participant in the world community.

### *Improving the World Appraisal of Public Policy*

Granted that no single strategy holds the key to the consolidation of a satisfactory public order, a promising alternative is to concentrate on improving the decision process of the world community. This improvement may be brought about in two ways. It may be incidental to the official rôle that one plays as an appointed or elected public official at any phase of the process of policy formation and execution (whether the phase is intelligence [planning], promotion, prescribing, applying or what). Improvement may be through private, civic channels, as they impinge on the decision process, and give direct attention to proposing or appraising official action. Among these private, civic rôles lawyers and scientists have a rather distinctive part to play by making specialized knowledge and skill available to assist the body politic to appraise the efficacy of public policies and policy structures up to date. The fact that an appraisal is directed toward the recent or more distant past rather than the future has the advantage of inviting the use of accepted methods of research and analysis. The further fact that an appraisal must deal with widely ramified effects implies that the context must be taken into account and that interdisciplinary co-operation is indispensable to the task.

It is appropriate for the American Society of International Law to take further steps in cultivating the appraisal of public policy. For fifty years the annual meeting has provided a forum where individuals engage, with varying degrees of completeness and competence, in the appraisal of these policies. In recent years the Society has intensified its activities by evolving a system of interdisciplinary panels to explore the past, present, and future of public policies as they relate to our fundamental responsibility. Individual appraisals by well-known scientists and lawyers attract a measure of respected official and private attention. The proposed strategy is to increase both the comprehensiveness and the impact of these evaluations

by organizing them on a regular and inclusive scale. This Society, acting in conjunction with other appropriate private bodies, can provide a flow of reports that constitute an intermittent audit of the effectiveness of official action in achieving the declared goals of public policy.

The *goals* of public policy in the world community are authoritatively and often eloquently expressed in the Charter of the United Nations, the Universal Declaration of Human Rights, and other documents. The rhetoric, at least, is clear: we are committed to shaping a peaceful environment where human dignity can be realized in deed as in word.

The *criteria* for assessing the performance of official institutions must be specified by each interdisciplinary panel of scientists and lawyers. The selection of social indicators helps to fill the gap between abstract language and concrete contingencies.

The *characterization* of official performances as successful or not depends on expert judgment when it is disciplined by exposure to available information.

Consider the possible scope of a well-developed appraisal activity that is focused on the world community and reported on an annual, biennial or some other regular basis. The world community process would be surveyed: (1) participants, (2) value-institution sectors, (3) resource environment.

Consider the first category, the *participants*. Among the many relevant questions: How do public policies affect the numbers and quality of population? More particularly, do the prescriptions of international law affect the result? If so, how? Traditionalists remind us that the control of people is an exclusive interest of nation-states and that laws affecting contraception, abortion, sterilization, artificial insemination, refrigerated sperm banks, incubation outside the uterus, choice of sex, surgical change of sex, and genetic engineering, are matters of domestic jurisdiction. Hence any influence on population is a side-effect of international prescriptions applied to humanitarian intervention, conduct of war, transfer of territory, state succession, and the like. It is, however, generally acknowledged that uncontrolled population increase is a major menace to the existence and stability of the world community. As interdependence is more widely understood, and as emphasis on human rights gains intensity with desperation, it is unthinkable that public policies that deal directly with the volume and level of human capacity will be left to the capricious choice of parochial components of the world community. A continuing appraisal of public policies can be expected to assist in clarifying the social consequences of action or inaction.

Important as the appraisal of public policies toward population unquestionably is, we do not overlook the impact of public authority and control on *institutions* specialized to the shaping and sharing of all valued outcomes. A comprehensive model of the world community process draws attention to the entire range of human concerns that are differentially affected by power and the institutions of public order.

Power and the institutions of public order.

Enlightenment and the institutions of science and communication.

Wealth and institutions of production, distribution, investment, consumption.

Well-being and institutions of safety, health and comfort.

Skill and institutions of professional, occupational and artistic expression.

Affection and institutions of intimacy and loyalty.

Respect and institutions of social class and caste.

Rectitude and institutions of responsible conduct (religious, ethical).

Consider, finally, the *resource environment* of the world community. In recent years the countries with an advanced science-based technology have been alerted to the destructive impact of past policies for the human habitat. The suicidal consequences of chemical, radioactive, and microbiological blight have reached the attention of the elites and mid-elites of many societies. It is recognized that we are past the eleventh hour in the pollution of the principal components of our system of lakes, surface rivers, underground waters, estuaries and oceans. The ecology of vast areas is out of balance. The safety, health and positive well-being of man are imperiled by polluted air, toxic food, radioactive waste, and demoralizing noise. Creeping congestion spreads from the core of existing urban aggregates, and endangers the psychic stability no less than the physical integrity of human society.

The moment would appear to be opportune to join with other professional and scientific societies in inaugurating the first *Review of Public Policies toward Environment 1972*. The timing of institution-building is important. It is not feasible to launch an utterly comprehensive appraisal all at once, either at the national or transnational level. Concern for what Richard Falk calls *This Endangered Planet* is sufficiently general and intense to warrant a first step by participating in a review of policy and environment. The scope of such a *Review* would go beyond an evaluation of the *technologies* chosen by public agencies to control utilization. It would characterize the *organizational structures* and *legal dimensions*. The *Review* would take account of the adequacy of the strategies employed (or neglected) to *inform* and *mobilize* public opinion and group support.

The initiative for such a *Review* has been taken by the American Geographical Society, the American Division of the World Academy of Art and Science, The New York Academy of Sciences and some other associations. Such a review must proceed with panels where physical and biological scientists work together with political scientists, economists, lawyers and other specialists on the arts and sciences of human culture. The panels must deal with manageable sectors of policy and environment. For example:

(1) In reference to outer space, an appraisal would consider whether spatial exploration and the orbiting of artificial satellites have affected the exchange of deleterious organisms, or the integrity of the magnetic fields that protect our atmosphere—hence our lives—from destruction by the solar processes that have evidently deprived the inner planets of their at-

mospheric covers. Appraisals would feed back information about the positive or negative effects of public policy on the utilization of solar energy to replace our dependence on fossil fuels, with their notorious consequences for pollution; or policy effects on the exploitation of the mineral assets of celestial bodies; or on the discovery of ways of adapting human potential to environments of varying gravitational and other characteristics.

(2) With regard to the atmosphere, appraisal processes can keep us abreast of the effect of enterprisory, regulatory and supervisory measures on activities affecting the composition of the air.

(3) The technology of climate and weather control calls for the assessment of the technologies, organizations, the legal arrangements and the support strategies involved.

A simple check list of other sectors of the resource environment will suggest further activities to be appraised. The reference is to public policy and:

4. Water
5. Marine Life
6. Seabed
7. Terrestrial movement and vulcanism
8. Fossil Energy
9. Nuclear and Other Energies
10. Subsurface minerals and metals
11. Growth and Processing of Food
12. Forests and Timber Processing
13. Land animals
14. Special Regions: Polar, deserts, marshes, estuaries
15. Static and Mobile Constructions.

Who are the *audiences* to whom such an appraisal is directed? The American Society has no difficulty naming the immediate audience. It is the "self," the membership. The audience is enlarged by the members of co-operating societies who share directly in an appraising process. Actually, appraisal activities would be justified if they did no more than to provide an intelligence service for fellow professionals. The discipline of conducting such an operation invariably raises issues that have been inadequately dealt with in the available literature. In this way, research, teaching, consultation and official decision are all affected.

Appraisal reports are also aimed at wider audiences than fellow specialists. They can be made available in forms and through media that are adapted to audiences of varying motivation and competence. They will probably reach the attention of participants at every phase of the decision process: planners whose work is being appraised; political parties, pressure groups and communication media, in search of an issue or a justification; legislative or negotiating officials who are targets of praise or blame; invokers, who recognize negligence; appliers who see new possibilities; terminators, who acknowledge obsolescence; official appraisers who may improve their own future performance.

The *Review of Public Policies toward Environment 1972* is a step toward changing the fundamental structure of world public order. It brings to the focus of attention the facts of global interdependence. The facts of interdependence, when duly and persistently recognized, provide a world map of knowledge and expedites the discovery of common interests, the progressive modification of policy preferences (in terms of common security and welfare), and more effective identification of the "self" with the fate of man. The *Review* will probably contribute to the institutionalization of a world-wide appraisal function, initiated and carried out mainly by the scientific and professional associations of the private, civic order. It will presumably strengthen the hands of forward-looking officials in the public order.

In millennial perspective we have been part of a discernible species of life for perhaps a million years. We have been part of a complex configuration of bands, tribes and civilizations for about eight millennia. We have been part of a world community for less than five hundred years.

Even in tribal societies professionals acted as agents and counter-agents of the common interest in an expanding public order. As client-servers we have been closely bound to protecting established orders. As citizen-participants we have partially clarified the goals of a potential public order of human dignity. The interdisciplinary *Review of Public Policies toward Environment 1972* would be a step toward the "ultimate" revolution whose distinguishing feature would be a decision process that delivers "permanent approximation" to the goals of human dignity. Such, at least, is our recommended agenda for the next millennial age.

## SECURITY AND DEVELOPMENT IN THE 1970's

*By The Honorable John N. Irwin II*  
*Under Secretary of State*

In the mid-1950's the great Jewish theologian, Martin Buber, came to Washington to give a lecture at a symposium on "Religion and Psychiatry." His topic was "Guilt and Guilt Feelings," and he told a story that has some pertinency today: "I had a friend," Dr. Buber said, "who all during World War II in Germany passed as a Gentile. He came to me after the war, a wretched man, distraught because he had not shared in the horrible suffering of his people. He felt he could not live with himself any longer, much less participate in society. I asked him if he had asked forgiveness of God. 'Yes,' he said, 'but He has refused.'" "Then," Dr. Buber said, "I told him to go see a psychiatrist."

This story of the difference between objective guilt and subjective feelings of guilt is relevant to our time, for we read and hear about many today who seem unable to envisage forgiveness either for themselves or for their country.

As lawyers we must be concerned by a society, however guilty it may be of error past and present, which is dominated by a sense of guilt, just

as a doctor would be concerned with a patient showing such symptoms. Nations, of course, cannot seek forgiveness as individuals can. Nations, especially rich and powerful ones, are not often forgiven for their mistakes. But there is a salvation in political regeneration, that is, in cultivating the courage to live with doubts about the past, with knowledge of past mistakes, while striving to solve and persevere with the problems of the present and the future.

Salvation in our society has always lain in accepting the great possibilities that the future holds. This is more than sentimental optimism; it is the kind of faith lawyers exhibit when they continue to work for a better rule of law in the future, perhaps even one day an international rule of law, in spite of the fact that they all learned in law school that, in the words of a Dickens character, "if the law supposes that, the law is a ass."

The rule of law does presuppose some self-restraint on the part of the citizen or the nation, as the case may be. Free speech must mean more than unbridled speech; freedom of assembly must respect due process and avoid invading the privacy of those who do not wish to assemble. We as a people do not always show self-restraint in these matters. And nations are still a long way from showing the necessary self-restraint to permit furtherance of the rule of law throughout the world. So we must persevere in spite of mistakes and doubts and the mistakes and doubts of mankind. Indeed, it is the measure of our courage and of our future to do so.

As long as nations fail to exercise the degree of self-restraint necessary for the acceptance of a rule of law, foreign policy must have a high priority in any President's calculations. As you all know, it has had constant attention from President Nixon. Since entering office, the President has been making a gradual, but significant, change in the foreign policy of the United States. He recognized that the 1960's, which began with such a hopeful sense of mission in this country and ended with such a tragic sense of error and guilt, marked the end of an era. There is not much dispute about this, not in the Congress, not in the Executive, not, I think, in the public at large.

In 1969 the Administration had to start where it was, not where it might have been had the course of history run differently in the 1950's and 60's. Somewhere between a too hopeful sense of mission and a sense of national paralysis caused by feelings of guilt, President Nixon sought a new policy that could induce confidence in others while commanding support at home. The result was the Nixon Doctrine which makes clear that what this Government does in the future will be determined more than in the past by what others are willing to do. This policy has allowed us to implement a program of orderly withdrawal from Viet-Nam within a framework of such continued financial and military support as our own security, the credibility of our commitments and the performance of the South Vietnamese Government warrant.

Instead of claiming a monopoly of initiative in this and other parts of the world, the Nixon Doctrine envisages a tailoring of our responsibilities and efforts to the willingness of others to accept responsibility themselves.

There is subtlety in this change in policy, one which reflects both lessons learned and experience confirmed. Tempering our sense of mission does not mean abandoning it. The United States must persevere with some sense of mission in the world if it is to help keep the peace and persuade others that this not only is our true aim but must be that of all.

This past week the President sent to the Congress a legislative package designed to give new substance to the Nixon Doctrine. Changing foreign policy is in part a matter of articulating new concepts and adopting new attitudes. At times it also involves changing the machinery of government that implements foreign policy. This is the objective of the new legislative package.

I will not lead you through the details of this legislation this evening, but I would like to try to spark your interest in it and in the concepts that lie behind it. The new proposals involve perhaps the most thoroughly considered changes of our foreign assistance programs since the institution of the Marshall Plan. The present machinery for implementing foreign assistance programs is centered in the Agency for International Development. A.I.D. is the lineal descendant of the Marshall Plan and the experience of the 1950's and early 1960's, when foreign policy initiatives were often considered to be the monopoly of Russia and the United States.

In the two-Power version of the world, United States *vs.* the U.S.S.R., there used to be no question but that the Congress would approve this means of implementing foreign policy—"foreign aid" it was called—because there was a general consensus about the goals of that policy. The United States took the lead in countering the expansion of what we spoke of as monolithic Communism, and also in the task of leading the less fortunate countries of the world out of the wilderness of "underdevelopment." This composite task commended itself to the American people because we were the world's richest and most powerful nation, which meant both that we felt we had abundance to spare and that we knew we had much to lose. It also commended itself because as a nation we have always had a spirit of generosity, and because we ourselves started life as a nation in revolt against a colonial Power and saw ourselves as uniquely equipped to help others in the same situation.

We are wiser, if sadder, today. In many ways, of course, both in the security area and the development area, the aid machinery and philosophy of the past have served this nation exceedingly well, better indeed than many seem willing to admit. And yet the simple mission concept of the past is no longer adequate. Our task today is more complex. The Nixon Doctrine attempts to take account of this complexity in that its definition in specific situations will depend in considerable part on the plans and initiatives of others, rather than simply on our own.

The President wishes to change the machinery of government which implements our foreign assistance policy to reflect this new situation. Specifically, he wants to organize separate assistance programs around the separate goals of foreign policy which can now be distinguished—security, development and humanitarian relief—in order better to focus

attention in the Government and in the Congress on those separate goals and so that better means can be fashioned for reaching them.

Through several decades of public and Congressional debate our foreign assistance programs may have acquired more objectives than a single program should be expected to support, and more expectations than it can hope to fulfill.

We believe that the beginning of a more realistic aid policy and of a better appreciation by the public and the Congress of the aid program's objectives would result from the sort of reorganization that has been proposed. In each of the three areas—security assistance, development assistance and humanitarian aid—we pursue objectives that are different in terms of their foreign policy impact and in terms of the time in which we hope to achieve our aims.

Foreign policy starts with security, not only with our own but with the defense capabilities of others who are important to our interests. The President defined a realistic rôle for security assistance in his message to the Congress accompanying the new legislation:

Our new security assistance program [he said] will seek to strengthen local defense capabilities by providing that mix of military and supporting economic assistance which is needed to permit friendly foreign countries to assume additional defense burdens themselves without causing them undue political or economic costs.

There are few more difficult decisions in foreign policy for any country than the allocation of resources between defense and other national goals. We know the dilemmas well. In poorer countries, the decision can be a heart-rending one, particularly because the costs of military modernization include much more than just the purchase price of new equipment.

For the future, the President has made clear that the United States is not going to put itself in the position of trying to make such decisions for other countries, as we often did in the past. However, the world has not reached the point where we or other countries can ignore defense requirements. The Administration hopes to examine more carefully than has always been possible in the past political alternatives to that of giving support for security purposes. We will also do our best to weigh the economic consequences that follow a decision to give such support. But we cannot escape the need for continued, substantial security assistance.

One of the principal purposes and benefits which we envisage from the new security assistance program is to permit the progressive reduction of our forces overseas in certain areas of the world. In Viet-Nam, where we are progressively transferring combat burdens, we have withdrawn some 265,000 men and by December 1 will have withdrawn 100,000 more. In South Korea, we have removed all U.S. combat forces from forward deployment at the DMZ and have reduced our total troop presence in that country by 20,000 men. Elsewhere in Asia, we will by this July lower the U.S. presence by some 12,000 men in Japan, 5,000 in Okinawa, 16,000 in Thailand and 9,000 in the Philippines.

Under the new proposal, the State Department will be given a renewed



mandate to co-ordinate the military assistance program with broader foreign policy considerations. The State Department's rôle is to determine whether there is to be a program in a particular country and its general magnitude and shape. The Defense Department will continue to administer the program, seeing to the procurement and delivery of military end-items, and will provide general guidance to the State Department and to the President as to how the security assistance program fits in with our over-all national security policy. The administration of the funds for economic supporting assistance will be moved back to the State Department from A.I.D. Both the military and economic assistance programs will be pulled together under the direction of a co-ordinator with Under Secretary rank. Such a step will make the security assistance program a more coherent and better co-ordinated whole.

The other major component of the reorganized aid programs is development assistance. There is little need to argue before this audience that assisting global development must continue to be a major goal of American foreign policy. Many of you here tonight, who in the past have been personally involved, know only too well how instrumental in the creation of the present system of international development co-operation the United States has been. You also know that for years the United States was a much larger contributor of capital to this international system than all other donors combined. But have you realized that the U.S. initiative has succeeded to such an extent that other industrialized countries together now give more than we do (in 1970 \$5.5, as against our \$4.1, billion in commitments)?

The multilateral development institutions, with extensive U.S. support, have grown to the point that they now provide a major share of the resources available to the less developed countries and can assume a leadership rôle in co-ordinating responsibility similar to the rôle which the United States used to play as the one large donor. Some 80% of our bilateral aid is now provided through multilateral institutions and international consortia or in the context of other aid-related co-ordination groups under international auspices. The developing countries have increased their own ability to plan and co-ordinate the use of resources, both those obtained from abroad and those from their own savings.

As lawyers, interested in world order, we have to recognize that there has been much more progress in development co-operation than there has been towards a world rule of law. The Chairman of the Chase-Manhattan Bank even commented recently that the multinational corporation has succeeded rather better than the United Nations itself in moving back the barriers of narrow nationalism.

We must, of course, recognize that development is hardly a synonym for peace and security. Mr. Eugene Black, when President of the World Bank, used to speak of development as a "fickle process." "It destroys old habits and attitudes towards life and work," he said, "even as it creates new wealth and opportunity. . . . It often encourages expectations much faster than it creates the wherewithal to fulfill them." But, the growing

international consensus on development assistance provides some hope that mankind can work together to fashion a better and more peaceful world. This should not be surprising when one considers that development assistance affects the central concerns of perhaps 70% of the world's people, living in 100 different countries.

President Nixon knows that if the United States should ever lead a retreat from this consensus, we would deal a heavy blow to our long-term hopes for an enduring structure of peace. This is why close co-operation with regional and international development institutions is a key element in his new policy. Here again, however, our actions will be determined in considerable part by what others do. The virtues of regional and international development organizations lie in their collective character. They pool the resources and resourcefulness of many nations. They must tolerate diverse development strategies and therefore inhibit the dominance of theories that do violence to important segments of humanity. Because development assistance inevitably involves the donor in the internal affairs of the recipient, advice often comes more easily from a "neutral corner," such as international and regional organizations provide, than from a single "great Power."

At the same time we have special interests in the countries of the Third World that cannot always be reflected in multilateral organizations without weakening the very consensus that is their strength. Also, development assistance serves both to complement our trade and investment policies and to provide an outlet for the special talents we as Americans want to bring to bear on development problems. For such reasons we will need a bilateral development program for many years to come.

The new International Development Corporation proposed by the President reflects a host of changes, long recommended by officials, professional people and businessmen who have been close to development assistance programs in the past. The Corporation would take over the present development loan activities of A.I.D., but with an important shift of emphasis. First, it would be a semi-public corporation, rather than strictly a governmental agency, and would, through its broad membership and its policies, seek to involve the private sector more fully than in the past. Second, it would largely limit itself to the rôle of lender rather than attempting comprehensive development planning and programing as A.I.D. has frequently undertaken in the past. It would respond to projects and initiatives presented by potential borrowers rather than attempting to map out its own country programs. It would thus reward self-help efforts and encourage the developing countries themselves to come forward with sound projects.

The new legislation asks Congress to give the Corporation a three-year lease on life and to grant considerable flexibility in raising money both through the annual appropriations process and by borrowing in the private market or from the Treasury. These authorities are requested because a lending institution which is to respond flexibly to projects presented to it can be budgeted year by year only with difficulty. The new Corporation

should be able to gear its funds to the negotiations it enters into, not to annual negotiations with Congressional committees. Nothing weakens the present A.I.D. machinery more than this lack of flexibility.

The President has also proposed a new International Development Institute, which will take over A.I.D.'s present responsibility for our bilateral technical assistance programs. Here, too, there will be important differences. As with the Corporation, public board members and a new philosophy will try to engage the private sector more than has been possible in the past in a multifaceted governmental development agency. The Institute will be primarily designed to give Government support to the host of private groups interested in applied research and technical assistance who realize that development problems today do not clearly divide countries into rich and poor or north and south, but reflect instead the common predicament of man in our time. The population problem; the problem of growing more food; the problem of creating room and opportunities in the modern money economy for millions who are demanding entrance without the needed skills; the problem of preserving a healthy natural environment. These are not the problems of poor countries alone. They are our problems, too. The result could be a two-way sharing—a sharing of experience in which both parties learn and in which we find abroad as many solutions to our common problems as we ourselves provide.

This new approach to development aid, with its emphasis on progressive self-reliance, requires comprehensive economic policies which will support and stimulate economic growth in the developing world. These policies must encompass new, vigorous efforts by all the industrial countries to provide greater export opportunities, a willingness to grant debt relief under appropriate circumstances and a continuing, major rôle for private foreign investment. As part of this effort the United States has supported generalized tariff preferences by the industrial countries. The European Community and Japan will implement such preferences this year. It is expected that the Administration will soon introduce its own legislation to that end. We have also encouraged studies on the debt burden of developing countries which are now underway under the auspices of the international institutions. Through the Overseas Private Investment Corporation, established by Congress last year, we try to encourage private foreign investment in countries which are willing politically to permit an appropriate rôle for private foreign capital.

The third major area of our foreign assistance programs is humanitarian aid. Ever since the United States Congress in 1812 appropriated \$50,000 to aid the victims of an earthquake in Colombia, it has been an American tradition to respond quickly and generously to those who are the victims of disaster. The experience of this Administration, which has provided emergency assistance to victims of civil war in Nigeria and Jordan, of earthquakes in Peru, of cyclones and floods in Rumania and Pakistan, all demonstrates that the Executive Branch requires a strong high-level staff able to respond quickly when disaster strikes. The proposed reorganization of foreign aid would improve our capabilities in this area by combin-

ing, under a newly created post of Assistant Secretary of State for Humanitarian Assistance, the following activities: disaster relief; refugee and migration assistance; and liaison with international voluntary agencies, such as the International Committee of the Red Cross.

One concern which has been raised in the Congress about these new proposals and policies is the adequacy of Congressional oversight. We believe that, compared to the present arrangements, the President's proposals are a step forward in the direction of a more effective accountability before the Congress. This is in part because the new proposals separate the goals of policy to permit the Executive, the Congress and indeed the public at large better to distinguish the precise goals of our foreign assistance programs, to establish priorities among those goals, and to judge the performance of the responsible organizations by whether or not those goals have been reached.

It will take time to work out with the Congress the new machinery that the President has proposed. But then changing foreign policy is not like changing a suit of clothes; at least it had better not be, if we seriously want to improve our ability to help world development and serve world peace. In the proposed legislation the President is not recommending changes for a year or even for an Administration. He is looking forward at least through the 1970's.

Whatever the differences we may have about the proper rôle our country should play in the decade ahead, there is at least, I hope, a consensus that there should be a new beginning. One danger, from my view, is that the fashionable pessimism of today may rob us of the courage to look ahead, to chart a new course that will revive popular, bipartisan support for our foreign policy, and particularly for the foreign assistance element of that policy. After all, the essence of courage is our ability to live with doubts, not only about the past, but about the future as well—to live with doubts while asserting anew our curiosity about problems to be solved and our interest in human betterment and social progress through pragmatic, purposeful action. It is that curiosity and interest which have distinguished us as a nation and that curiosity and interest which I hope I have reawakened or maintained, at least in some small degree, in all of you tonight.

Saturday, May 1, 1971, at 12:30 p.m.

JOINT LUNCHEON WITH THE SECTION ON INTERNATIONAL AND  
COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION

The meeting was convened at 1:15 o'clock p.m. in the Congressional Room of the Statler-Hilton Hotel. Mr. Ewell E. Murphy, Chairman of the Section on International and Comparative Law of the American Bar Association, presided.

Mr. MURPHY introduced the guests at the speakers' table and then presented Ambassador Edvard Hambro, President of the United Nations General Assembly.

Mr. MURPHY. It is a saying of greatest use and perhaps worthy of repetition that "The men of Norway are as fierce as her winters and as enduring as her mountains." And I think that perhaps these symbiotic qualities of fierceness and endurance are among the qualities that are called for in the most serious governing body of the world, the United Nations. And it is extremely appropriate that the Presidency of the General Assembly should be in the hands of an individual who, in a very diplomatic way, represents the quality of fierceness and, in a very patient way, the quality of endurance.

This gentleman has had a distinguished career in scholarship and politics and in diplomacy. He appears before us today in many rôles: as the President of the Twenty-Fifth Session of the General Assembly of the United Nations; as the Permanent Representative of Norway at the United Nations; and twice, both regular and honorary, as a member of the Society!

We are very pleased to hear at this time Dr. Edvard Hambro.

Dr. EDVARD HAMBRO. Thank you very much. I can assure you that I will try to control my ferocity! First of all, I think that I should like to ask you all to join me in sending the best wishes for a speedy recovery to my old friend, Stavropoulos, who should have been here today, but he unfortunately fell ill, and that is why you will have to make do with me instead of him. But I hope that the Society will send him all the good wishes for his speedy recovery.

PROBLEMS FACING THE UNITED NATIONS

*By Edvard Hambro \**

I have been asked here to talk for about half an hour on a subject that really demands not half an hour, not one hour, but a long series of lectures. But I will still try to throw out some ideas of some substance concerning what are, to my mind, some of the crucial problems facing the United Nations in the future and to proceed on the background of the twenty-five years that have passed.

\* Permanent Representative of Norway to the United Nations; President of the General Assembly.

During the commemorative session we talked brave words about the Organization and praised the Organization and ourselves because we have not had the third World War. We all know that the chief purpose of the United Nations should be to keep the peace. And I think that we are so realistic that we realize among ourselves that in this particular respect the Organization has not so far been an unqualified success. We have had, I think, since 1945, on an average, an international war or an international clash of arms once every five months. And if we add to that civil wars and disturbances—a different word—I think that we could state with safety that we have probably had one serious clash of arms every single month in the last twenty-five years. And we have no particular reason either to congratulate ourselves because the wars have been small and local. I do not know what the statistics are, but let us just remind ourselves of two or three figures:

In the war in Korea a greater bomb load was dropped than in the entire Pacific theater of war during the second World War. And in only two years in the Viet-Nam War, 1965 to 1967, a greater bomb load was dropped than in the entire European theater of war in the whole second World War. And in the Seven Days' war in the Near East more tanks were used than the combined number of tanks for all the belligerents in the Battle of El Alamein, which turned the scales in the second World War in Africa. I do not say this to be an alarmist, but I think that we ought to get these things in our background when we talk about the United Nations and what we do in the future.

In the same connection, I should like to mention armaments. Disarmament is also a purpose of the United Nations, and I think that we ought to realize there, too, that we have not been very successful. Certain steps have been taken, certain conventions have been agreed to, of considerable importance, like the Non-Proliferation Treaty, the Treaty to Forbid the Installation of Arms of Mass Destruction on the Seabed. We are now on a good road to conclude a treaty forbidding biological weapons.

But you must still remember that the combined arms costs of the world today are amounting to very close to 200 billion dollars a year. I mention this because there is a striking difference between the amounts of money that the nations are willing to pay for arms and the amounts that they are willing to pay for peace. Every year people talk in the United Nations about saving money and cutting the budgets. Last year, to take one example, and the year before that, the Ambassadors of all of the permanent members of the Security Council came in a procession to the Secretary General and said, "We can't afford the crushing burdens of the budget of the United Nations." The whole budget of the United Nations that year, that is, the ordinary budget of the United Nations in New York, is less than 200 million dollars. That is one-thousandth part of what is paid for armament.

We ought really to get another sense of perspective, another sense of proportion, in the life of nations, if we should have any real hope that the United Nations should be the organ and the Organization we hope that it should be in the future. I think that the armament race comes as close

to collective insanity as anything in the history of mankind, and it is, to my mind, surprising that public opinion in the world still is willing to take it.

And when we talk about peace and security, we must realize that there is a very grave danger, I think, in our Organization, namely, that the conflicts between nations hardly ever come to the Organization before they are in a state of acute crisis. And then very often it is too late to do anything about it in a peaceful way. We ought to be able to develop within the Organization procedures by which we watch out for conflicts and try to control them before they have reached the state of acute crisis. This should not be impossible, and one of the few good things that have happened in this particular field in late years was that the Security Council at last agreed to hold the periodic meetings with the presence of the Foreign Ministers which was envisaged in the Charter twenty-five years ago. Such periodic meetings started only last year. It was greeted as a great achievement and as an important step and advance but, Ladies and Gentlemen, this was six months ago. I have never heard of a second periodic meeting. Now we agree, when we look at it from a purely linguistic point of view, a period may be short or a period may be long. We might have a periodic meeting once every ten years, and they would still be periodic, but not of very great practical importance. So let us hope that it is to be taken up again.

Now this, of course, leads to the question of peaceful settlement of disputes. That ought to be more important than the stopping of wars when they come. And here again we have the machinery, both inside and outside the United Nations. In the Charter we hear about conciliation, mediation, good offices, arbitration, judicial settlement, and so forth. We have a very large number of procedures for peaceful settlement and they must be used much more in the future than they have been used in the past.

We have heard in the United Nations, year after year, proposals for such a very small step forward as having machinery for fact-finding. It has never been adopted. And one of the reasons—and this, I think, is important for lawyers—one of the reasons why the peacekeeping machinery has not been used to the extent it should be is that people have asked themselves whether the law that should be applied is good enough for present-day purposes. People all over the world ask themselves, Is the international law of today of such a character that we can expect that nations will be willing to solve their conflicts on the basis of that law? And that, for lawyers anyhow, is a very crucial problem.

This is a crucial problem in the United Nations, I think, particularly on account of the new membership of the organization. When we met in San Francisco twenty-five years ago we were fifty nations represented. It looked very much like the League of Nations in membership. Today we are 127 Members and a great number of these nations were not free nations in 1945. This means that the majority of Members of the United Nations were not members of the international community when international law, as we know it today, was formulated. And that is one of

the reasons why many nations feel hesitant to use international law as it exists. In the United Nations, I think, there has been a tendency for very many nations to say, "The important thing is not to apply the law of the past; the important thing is to create the law for the future." And we ought to ask ourselves, have we got the machinery to create the law for the future that will recreate complete confidence in international law?

I will first talk about that a few minutes in a general way, and then I want to mention some of the important fields in which progress must be made in the future, if we expect to be able to live together on this planet—to use the term that Richard Falk has just used in an important new book, "this our endangered planet."

Now let us first not be too negative about it. The new nations do not discard international law. They do not oppose international law as such. One of the first two things most nations do when they get their independence is to apply for membership in the United Nations and to adhere to the Red Cross conventions and become members of the International Red Cross. And both of these two steps indicate quite clearly that they accept international law as a body. You cannot become a Member of the United Nations without accepting the fundamental rules of international law. But they want to change this law. They want, particularly, to get rid of what they consider unequal treaties, and to make sure that they are considered to be members of equal standing. One of the signs of this is the objection to a term used as a standard of the International Court of Justice, where it is stated that one of the sources of law is the principles of law generally recognized by civilized nations. The new nations oppose that very strongly. It is not very practical in importance today because everybody realizes that what we mean by that today is just the general principles of law as recognized by the members of the international community. But the new nations object to this and we ought to stop using that term. Everybody can interpret that as they like: whether it means that we are all civilized or that none of us are civilized! There may be a little bit of truth in both interpretations!

I will just discuss one particular item of this, that is, the work done by the United Nations:

We live in a period of revolutionary changes. There is always an element of the static in law, and it is impossible for law to keep up with technical development as it is today, which was very ably and eloquently pointed out by Judge Jessup in his address before the Society yesterday. But in the last fifty years, more has been done to develop international law, to codify international law, than ever in the history of mankind—ever so much more. And in this work of codification all of the new nations participate on terms of equality with the old nations.

There is one source of international law which also was discussed at the meeting yesterday: That is the resolutions and declarations of the United Nations. The United Nations has not been given legislative authority, and as a matter of strict law, declarations of the United Nations are not legally binding. But I would like to suggest here, in this audi-



ence of lawyers, that that is only one part of the answer. If the United Nations adopts unanimously or by an overwhelming majority, a declaration with the purpose of declaring the law—either of declaring what they think is the law or of making new law—I think that it is quite wrong to say that nations can repudiate at will such resolutions and declarations. Let us talk about nations which vote in favor:

I think that nations which vote in favor of law-making declarations of the United Nations are not allowed afterwards to state calmly, "We voted in favor of such declarations because we know that declarations aren't binding, and now we can go back to our home countries and pursue a policy of violation of the declaration that we voted for in the United Nations, because, according to strict law, we have the right to ignore the resolution, which is not of a binding character." Such a cynical flaunting of the United Nations goes against one of the fundamental principles of all, namely, the principle of good faith.

This is a very difficult question. I am not going to go further into it. But I am just going to state that I think that it is too simple, too negative, short-sighted and superficial to say that nations are free to violate such declarations because in strict law they are not binding. And here we are living in a period where the law is being changed, and I for one think that that is a very good thing.

Now I mentioned that this desire to change is, to some extent, a function of the changed membership. And here, of course, we have one of the fundamental changes in the international community since 1945, which all of us have seen; that is, the increasing membership. And obviously, the United Nations must, in order to be an important organization, be a universal organization.

Today probably it is flogging a dead horse to say that China—mainland China—must be a Member of the United Nations. It is, to my mind, one of the most peculiar situations in the world that the United Nations has accepted the principle that Chiang Kai Shek and Taiwan should represent China more than twenty years after a revolution in China. My country recognized the Government of Peking very soon after it got into power, and always has been in favor of having it in the United Nations. And here, if I may, I make use of a childish parallel, which, I think, really answers this question; that is, the thing that I learned when I was a Boy Scout, when I learned how to go around in a district without roads but using map and compass, and my Scout Master said to the boys, "If there is any discrepancy between the landscape and the map, it is generally the landscape that is right." (Laughter.) I mean, to some extent, that such is also the case in international law. (Laughter.) It is quite clear that we cannot hope for any real progress in disarmament without having China with us. We cannot hope to do anything constructive against the pollution of our human environment without China, without Germany, and certain other states.

Well, now, I think that I would like to talk about some of the other aspects of international life, which I consider today to be of the very greatest importance.

We have mentioned the increased membership. That also disposes of the question of colonialism. And this is one of the fields where progress in the United Nations has been immensely larger and quicker than anybody dared to hope at the San Francisco Conference. Nearly all of these countries that are free today were colonies or protectorates before, and this has gone much, much faster than ever before.

In the same connection, I should like to mention another part of the United Nations where real progress has been made, and that is the question of development aid. We can discuss whether all that has been done has been practical, whether all of the money has been correctly spent. We can also certainly discuss whether we have been willing to spend enough money. The answer, quite obviously, to my mind, is no, we have not. To spend more than ten times the amounts on arms that we spend on development aid is quite clearly absurd. But the important thing, to my mind, is that we have realized today in the world that we all have responsibility for each other. We consider today that it is not only unpleasant but immoral that certain parts of mankind can live in luxury and affluence whereas the vast majority of mankind goes to bed hungry nearly every day. And that, Ladies and Gentlemen, is a completely new thought in the world; that is what we ought to realize.

I will just mention a couple of examples to illustrate this:

When I spent some time in this country thirty-five years ago, investigating or studying how international relations were taught in this country, we talked quite a bit about the "have's" and the "have not's." But, believe it or not, thirty-five years ago the "have not's" were not the poor nations, and the "have's" were not industrial countries. The "have's" in the terminology of those years, were the countries with colonies, and the "have not's" were those poor, miserable countries that didn't have a single colony! (Laughter.) The fact that we laugh at this today seems to illustrate quite clearly the revolutionary change in our whole thinking about these problems. Today to talk like they did thirty-five years ago would be considered completely mad. And the fact that that has taken place gives us, I think, some hope for the future, that it is possible to change our thinking habits—and that is, of course, what we all need.

And now I am going to mention two more fields which you must think about:

One of those fields is a new one in international law, that is, the field of the seabed and the ocean floor. We have realized today that it is quite inconceivable for the future to permit nations to occupy bits of the seabed or the ocean floor for their own exclusive purposes. We have realized that we will not tolerate a new colonial grab, that we will not permit the rich and powerful nations to get hold of all of the riches of the seabed and the ocean floor, and thereby become still richer and make the gap between the richer and the poorer nations still greater. We have agreed in the United Nations to the principle that the riches on and under the seabed are the common heritage of mankind.

When we discussed this at the United Nations, some very learned lawyers said, "This is nonsense. There is not such a thing as the common

heritage of mankind. That is a completely new term." Some of us answered it, "Yes, it is a completely new term. But it is a new idea, and for new ideas we need at times new terms and new words. And the term 'the common heritage of mankind' is such a term, which helps us to realize that something new is happening." And we must, at times—even we lawyers—use our imagination. We must not accept that people say that this is idealistic, this is new, it is not realistic. There are certain people who always try, in the name of realism, to fight against anything new in this world. But of them we can truly say that realism is the last refuge of a barren mind! (Laughter.)

We need to work together to organize the riches on the seabed and the ocean floor, and we must realize that what is on the seabed and under the seabed must not be seen in isolation. It must also be seen in combination with what is in the sea and on the sea. All the questions of the sea and the seabed must be put together and we must develop new law in this particular field.

We must realize that the ocean is in desperate danger of being destroyed by pollution in our present world. People—scientists—talk quite seriously about the death of the ocean. When my countryman, Thor Heyerdahl, went across the Atlantic in the "Ra II," he took tests all across the ocean, and nearly every day he found signs of pollution, of oil, not near the coast but in the middle of the ocean, and this has been collected and has been investigated scientifically, and we are going to hear more about it.

But it is quite clear that what is happening in the world today in the field of pollution of our sea and of our air is a danger to the survival of mankind on this planet. And we must get together and work very constructively to save the human environment. You know that we are having this meeting in Stockholm in 1972 about it, and we must make sure that that conference will be a success. We must realize that the effects of pollution are world-wide. Poisoning of the atmosphere and of the ocean does not know international borders. It does not respect national sovereignty. And for that reason, the fight against such pollution must be equally international and must—it sounds brutal to say it to a lawyer—be equally opposed to strict sovereignty and national independence. Or rather, states must pool their sovereignties to fight the common danger.

We must realize that it is not enough any more, as it was in the past, to consider international law as the law of co-existence, or the law of co-ordination. International law of the future must be a law of collaboration of all nations. We, as lawyers, ought to use our knowledge of the law and our respect for the law in such a way that we can teach statesmen, politicians and diplomats that it is obsolete today to stress absolute sovereignty of national states. Much more important than absolute sovereignty is the overriding rule of human solidarity. And we also ought to realize that it is unrealistic today to believe in such a thing as the absolute independence of nations. It is much more important to realize—and to act on it accordingly—the interdependency of all nations living together on this planet.

And I should like to end up by one sentence here. I am sorry if this sounds like preaching, but I feel this so very strongly that I think that we all have a duty to preach about this, even if people accuse us then of being idealistic and starry-eyed and not being a realistic lawyer. We ought to realize—and that is our final word there—that it is short-sighted to say that we cannot do it because it is impossible to do it today. We ought not to be satisfied when people tell us that politics is the art of the possible. Politics should be the art to make possible tomorrow what seems impossible today.

(Applause.)

The CHAIRMAN. Thank you, Dr. Hambro, for those very Norwegian, those very fierce and very enduring words.

Ladies and gentlemen, we are adjourned.

Whereupon, at 2:00 o'clock p.m., the meeting was adjourned.

Saturday, May 1, 1971, at 3:00 p.m.

THE PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

Statler-Hilton Hotel

Case arising out of an Aerial Hijacking incident

AEGEA AND BARCELONA v. FRANCONIA

Judges of the Moot Court:

The Honorable BYRON R. WHITE, Associate Justice of the Supreme Court  
of the United States.

Mr. NAJEEB E. HALABY, President, Pan American World Airways.

Mr. CHARLES S. RHYNE, President, World Peace Through Law Center.

Finalists:

University of Texas	v.	University of California (Davis)
DAVID P. GRAHAM		STEPHEN AUSTIN
DAVID P. SEIKEL		THOMAS GOFF
GUY L. WATTS		EDWARD CONRY
		GEORGE MARTIN

The University of Texas team was declared the winner, and the University of California (Davis) team, the runner-up. Vanderbilt University won the award for the submission of the best written memorials. David P. Seikel of the University of Texas was declared the best oralist in the final and semi-final rounds.

Other semi-finalists in the competition were:

Boston University	State University of New York
Haile Selassie I University	at Buffalo
(Ethiopia)	Vanderbilt University
National University of Rosario	West Virginia University
(Argentina)	Queen's University of Belfast
	(Northern Ireland)

## APPENDIX

### REPORT OF THE COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE AND THE UNITED NATIONS

#### DEPARTMENT OF STATE PUBLICATIONS

Once again the Committee must report an increasing and discouraging time lag in the publication by the Department of State of its official diplomatic records in the *Foreign Relations* series. Only four volumes were published during the past year.

It was nearly a decade ago that President John F. Kennedy wrote on September 6, 1961, to the Secretary of State, the Secretary of Defense, and other interested officials referring to the time lag of 20 years in the publication of *Foreign Relations* as "unfortunate and undesirable." He called upon all agencies of the Government to co-operate with the Department of State in preparing the record of our diplomacy, and stated that in his opinion "any official should have a clear and precise case involving the national interest before seeking to withhold from publication documents or papers fifteen or more years old."

We have now arrived at a 25-year gap. The regular annual volumes currently being published are those for 1946. For that year there are eleven volumes. Four of these were published in 1969, three in 1970 and four remain to be published. It should be noted that the records of the post-World-War II conferences are not published in a separate series as were those for the conferences held during the war, but are included in the regular annual volumes. Among the volumes published in 1970 were one for the Council of Foreign Ministers and two for the Paris Peace Conference. The remaining volumes to be published deal with the United Nations, the Far East and China.

The special series on the World War II Conferences is in its final stages. One volume of this series was released this year and one volume is yet to come.

The status of the *Foreign Relations* volumes recently published and in preparation follows.

#### World War II Series:

Conferences at Washington and Quebec, 1943. Released February, 1971.

Conference at Quebec, 1944. Partially in galley.

#### Regular Annual Volumes:

##### 1946

- I General, United Nations. Galleys being revised for paging.
- II Council of Foreign Ministers. Released 1970.
- III Paris Peace Conference: Proceedings. Released 1970.
- IV Paris Peace Conference: Documents. Released 1970.

- V British Commonwealth, Western and Central Europe. Released 1969.
- VI Eastern Europe, Soviet Union. Released 1969.
- VII Near East and Africa. Released 1969.
- VIII Far East. Index being reviewed.
- IX Far East: China. Index being prepared.
- X Far East: China. Index being prepared.
- XI American Republics. Released 1969.

## 1947

- I General, United Nations. Delay on clearance.
- II Council of Foreign Ministers, Germany, Austria. Index to be revised.
- III British Commonwealth, Europe. Held up by procedural delays on clearance.
- IV Eastern Europe, Soviet Union. Index to be revised.
- V Near East and Africa. To be indexed.
- VI Far East. To be indexed.
- VII Far East: China. Awaiting foreign government clearance.
- VIII American Republics. To be indexed.

## 1948

- I General, United Nations. Undergoing clearance.
- II Germany, Austria. Held up by procedural delays on clearance.
- III Western Europe. Undergoing clearance.
- IV Greece and Turkey, Eastern Europe, Soviet Union. Undergoing clearance.
- V Near East, South Asia, Africa. Manuscript being revised.
- VI Far East and Australasia. Undergoing clearance.
- VII Far East, China. Undergoing clearance.
- VIII Far East, China. Undergoing clearance.
- IX Western Hemisphere. Galleys being reviewed for paging.

## 1949 (Tentative)

- I General, United Nations, Western Hemisphere. Manuscript being edited.
- II Council of Foreign Ministers, Germany, Austria. Manuscript sent to Government Printing Office for galleys.
- III Western Europe. Manuscript being compiled.
- IV Eastern Europe, Soviet Union. Manuscript being compiled.
- V Near East, South Asia, Africa. Manuscript being compiled.
- VI Far East and Australasia. Complete in galleys.
- VII Far East: China. Complete in galleys.
- VIII Far East: China. Complete in galleys.

The above report shows that compilation of manuscript has been completed on all volumes through 1948 and on all but three volumes for 1949. Compilation for 1950 is in progress over a wide range of subjects. It is expected that the record for 1950 will be contained in six volumes but they are not yet organized. An important subject for that year will be, of course, the Korean War.

The rate of compilation of the *Foreign Relations* volumes is behind that necessary to maintain even the present gap. The prime cause is that the *Foreign Relations* Division of the Historical Office is considerably understaffed and has been for years. The authorized professional staff a year

ago was fifteen, with three vacancies. Two vacancies were filled but the third position was lost. The professional staff has continued to the present at fourteen. To the credit of the higher authority in the Department it must be stated that two additional positions were placed in the Department of State budget for the next fiscal year beginning July 1, but these positions were eliminated at a later stage of budget preparation. There is, therefore, slight prospect of any increase in staff for more than a year to come. Only strong interest on Capitol Hill could change the picture.

An even more serious cause of delay in the publication of *Foreign Relations* than lack of staff is the difficulty of obtaining clearance for the documents in galley. Occasional difficulties arise in clearance with interested foreign governments on the unpublished documents originating with them. The chief sources of delay, however, are within our own Government, either in the Department of State itself or in the Pentagon or Security Council.

Passage of time seems to make little difference in difficulties of clearance, which are as great, or greater, now with a 25-year gap than in former times when publication was within 15 years of currency. In some cases passage of time may increase the difficulty. Suppose, *e.g.*, recognition should be granted to the People's Republic of China. There can be little doubt that difficulties of obtaining clearance for the China volumes for 1947, 1948 and 1949 would become greater than had these volumes, long since in galley, been published within the last few years.

After all allowance is made for the greater and more complicated involvement of the United States in world affairs than in earlier times, there remains good reason to believe that much of the difficulty in obtaining clearance for the publication of our diplomatic records is due to over-caution of officials imbued with a spirit of secrecy. This may be stronger at lower levels than at the top, but with the pressure of work it is difficult to obtain high-level consideration. Only sincere and active commitment at "top-side" can change this bureaucratic situation. The burden of proof should be on those wishing to delete the record, not on those following the commitment often made to a liberal publication policy.

There is some cause for concern that organizational change in the Department of State may weaken the scholarly, professional standing of the Historical Office, including the *Foreign Relations* division. The staff has been composed of trained historians since the editing of *Foreign Relations* was put on a professional basis in 1925. There has been a continuity of service rare if not unique in Government circles. In the 46 years since the establishment of this staff there have been only four editors-in-chief. The present editor, Dr. Everett Gleason, has held the position for more than seven years. Other members of the staff have had years of work in their specialties. Dr. John Gilbert Reid retired in January after 31 years as chief specialist for the Far East.

Under new organization plans, new employees are not selected as in the past from a Civil Service register of historians but from Foreign Service



or Foreign Service Reserve officers. Present employees may be integrated into the Foreign Service but if so they will face retirement at age 60. The plan is in too embryonic a stage to know how it will be worked out, but there certainly is chance of a loss in the professional quality of the work and of more frequent staff changes involving considerable delays in production.

This Committee again recommends a resolution by the Society expressing its interest in *Foreign Relations* publication at as rapid a rate as possible and its concern that professional scholarly standards be maintained.

*United States Foreign Policy 1969-1970* (Pub. 8575) is a 617-page report of the Secretary of State transmitted to Congress on March 26, 1971. It is divided into six parts: (1) policy developments by geographic regions; (2) international security; (3) economic affairs; (4) international organizations and law; (5) social and scientific dimension; and (6) management. The breakdown under international law includes the following topics: the International Court of Justice, law of treaties, aircraft hijacking and sabotage, oil pollution, the oceans, civil aviation liability, terrorism and kidnapping and the law of the U.N. Charter. In addition, the annex of the report, which runs to 268 pages, contains (1) principal foreign policy speeches, foreign policy statements, Presidential messages to Congress, communiqués and joint statements; (2) selected major U.N. resolutions supported by the United States; (3) treaties or agreements signed or ratified during 1969-1970; and (4) a list of principal officials of the State Department and associated agencies and U.S. missions abroad 1969-1970.

Whiteman's *Digest of International Law*. Only Volume 12 and the index volume remain to be published in this 15-volume record of the practice of states, principally the United States, since 1942. The two volumes appearing in 1970 were Volume 7, dealing with diplomatic missions and embassy property, consular offices and consulates and also international copyright and industrial property; and Volume 14, on economic relations and the law of treaties. Volume 12, which should be out in the summer of 1971, covers legal regulation of the use of force, measures of redress, peacekeeping machinery, peaceful settlement of disputes and the World Court. The index volume is also expected to be published this December, at the earliest, thus completing the series.

*U. S. Participation in the U.N.* (Pub. 8540) released in October, 1970, covers the calendar year 1969. It is the 24th annual report of the President to the Congress, and also is issued as House Document No. 91-280. Part Four of the report on legal and constitutional developments in the United Nations contains sections on the International Court of Justice, the International Law Commission, international trade law, the law of treaties, special missions, diplomatic privileges and immunities, friendly relations, the definition of aggression, assistance in international law and aircraft hijacking.

*Roundup of U.N. Developments during 25th General Assembly.* On the day of the adjournment of the 25th session, December 17, 1970, the United

States Mission to the United Nations issued a 23-page press release summarizing significant developments during the session. The release also contains a 2-page account of actions taken by the Security Council during the period from October to December, 1970.

*World Strength of the Communist Party Organizations*, 1970 edition, is the 22nd annual report of the Bureau of Intelligence and Research of the Department on Communist Party membership throughout the world, with the exception of the United States. The number of countries remains the same: 87. The Party was in power in 14 countries. The checklist of 155 countries and areas shows that the Party is proscribed in 44 countries, in five of which all other parties are proscribed as well. Communist Parties exist, either clandestinely or in open opposition, in 39 of the 44 countries in which they are proscribed. South Viet-Nam is, of course, one of the 39 countries.

*Viet-Nam: official statements.* The record of United States policy on Viet-Nam can be found in the following documents which are listed chronologically: the President's statement of March 6, 1970, on the scope of U.S. involvement in Laos (Pub. 8524); the Secretary of State's speech of April 25 before this Society on the rule of law and the settlement of international disputes (Pub. 8538; 64 A.J.I.L. (Proceedings) 285); the President's report to the nation of April 30 on the Cambodia strike (Pub. 8529); the U.S. Permanent Representative to the United Nations' letter of May 5 to the President of the Security Council on measures taken in Cambodia (9 I.L.M. 838; 64 A.J.I.L. 932); the Secretary of State's note to correspondents of May 6 on U Thant's call for an international conference on Viet-Nam (U.S./U.N. press release No. 59); the Legal Adviser's speech of May 28 on questions of international law raised by U.S. military actions in Cambodia (Pub. 8539; 9 I.L.M. 840; 64 A.J.I.L. 933); the President's interim report of June 3 on the Cambodian incursion (Pub. 8536); the President's report to the nation of June 30 entitled "Cambodia Concluded: Now It's Time To Negotiate" (Pub. 8544); the U.S. Permanent Representative to the United Nations' letter of July 1 to the President of the Security Council on the withdrawal of U.S. troops from Cambodian territory (U.S./U.N. press release No. 93); the President's television interview of July 1 on U.S. foreign policy (Pub. 8545); the President's address to the nation of October 7 entitled "A New Peace Initiative for All Indochina" (Pub. 8555); the President's report to the Congress of February 25, 1971, on foreign policy (unnumbered). In addition the Bureau of Public Affairs of the Department published a question-and-answer leaflet in May, 1970, on the situation in Cambodia (unnumbered).

*Viet-Nam: the Paris negotiations.* The public record of the negotiations consists of a succession of press releases which began with the opening of negotiations in May, 1968. The first plenary session was on January 25, 1969. Since then press releases have been issued after each plenary session, up to the 105th session on March 5, 1971. The press releases are obtainable from the Public Affairs staff of the Bureau of East Asian and Pacific Affairs.

*Viet-Nam Information Notes.* This series was discontinued in 1970, the last issue being No. 16 of February, 1970, "Basic Data on North Viet-Nam."

*Viet-Nam: Documents and Research Notes.* This series continues to supply "a selection of significant materials on Southern Viet Cong and North Vietnamese affairs," mostly translations of captured documents or intercepted broadcasts. Fifteen "Notes" have appeared since March, 1970, bringing the series up to No. 89 as of February, 1971. The Department sends the "Notes" to designated research libraries in each State. Researchers should inquire of the Bureau of Public Affairs of the Department to find out the nearest library to have received the series.

*Report of U.S. Delegation to the Inter-American Conference on Protection of Human Rights, San José, Costa Rica, Nov. 9-22, 1969.* The report was submitted to the Secretary of State by Richard D. Kearney, Chairman of the U.S. Delegation, on April 22, 1970. It has not been released as a State Department publication but Parts II and III of the Report and the conclusions of the Delegation were published in the July, 1970, issue of *International Legal Materials* (9 I.L.M. 710). The American Convention on Human Rights adopted at the Conference also appears in the same issue of I.L.M. Part II of the Report contains an "overview" of the convention, its legislative history and an analysis of the articles of the convention. Part III contains the resolutions of the conference. Not published is Part I, the description of the background, organization and proceedings of the conference, and two of the appendices to the report. The United States has not signed the convention.

*Press releases of the United States Mission to the United Nations.* 203 press releases were issued by U.S./U.N. in 1970. Some were published in the *Department of State Bulletin*, but the *Bulletin* does not contain a list by number and subject of the U.S./U.N. releases, as it does of the press releases of the Department. The releases include statements made by U.S. representatives in the Security Council, the General Assembly, committees and specialized agencies of the United Nations. Anyone wishing to obtain copies of U.S./U.N. press releases should inquire of the press office of the Mission, 799 United Nations Plaza, New York, N. Y. 10017.

*Background Notes*, one of the most popular series ever issued by the Department, are brief factual pamphlets, each on a different country or territory, which the Department began to publish in 1964. Each pamphlet includes information on the land, people, history, government, political conditions, economy and foreign relations of the country or territory. "Notes" on over 156 countries or territories have been issued. Coverage of the world will become virtually complete upon the issuance shortly of a "Note" on the United States itself. The Department is now undertaking to keep the series up-to-date by publishing about 75 revised "Notes" a year. Anyone can buy from the Superintendent of Documents a complete set of all currently in stock "Notes" and also subscribe to a yearly service to keep the compilation current.

*Treaties and Other International Agreements of the United States of*

*America 1776-1949*, the new series being compiled under the direction of Assistant Legal Adviser Charles I. Bevans, is now about half complete. The Department announced publication of the sixth volume on March 10, 1971. The first four volumes, released in 1969 and 1970, contain the multilateral treaties and other international agreements entered into by the United States from 1776 to 1950, in chronological order. Bilateral agreements are being grouped by country and published in the alphabetical order of the countries. Volume 5 of the series contains bilateral agreements concluded prior to 1950 with seven "A" countries and seven "B" countries, including three which no longer exist as such: Algiers, Austria-Hungary, and Brunei. Volume 6 had to be devoted entirely to the letter "C" because of the large number of treaties with Canada. It contains the pre-1950 agreements with ten countries: Canada, the Central American Federation, Ceylon, Chile, China, Colombia, the Independent State of the Congo, Costa Rica, Cuba, and Czechoslovakia. The index for the series will be published as the last volume.

*United States Treaties and Other International Agreements* (from 1950). This series is published in chronological sequence, one volume, though often in several parts, for each year. The 20th volume, containing all agreements for the year 1969, was published in 1970 in three parts.

*Treaties and Other International Acts Series*. The pamphlet series of international agreements reached Number 7034 by the end of 1970, an addition during the year of 221 new titles. A Departmental press release (No. 34 of Feb. 12, 1971) identifies the important new treaties or agreements which came into effect for the United States during the year 1970 as: the Treaty on the Non-Proliferation of Nuclear Weapons; the Stockholm revision of the Convention of the Union of Paris for the Protection of Industrial Property; the Convention establishing the World Intellectual Property Organization; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the Convention establishing a Customs Co-operation Council; the Convention on Privileges and Immunities of the United Nations; the Extradition Treaty with New Zealand; the Friendship and Co-operation Agreement with Spain; the Fisheries Agreements with Japan, Poland and the U.S.S.R., the Air Transport Agreements with the Congo (Kinshasa), Italy, Malaysia and Morocco; and the Agreement on the Transfer of Command, Control and Operation of five Loran Stations to the Philippine Government.

*Treaties in Force*. A List of Treaties and Other International Agreements of the United States in Force on January 1, 1971, was released on February 12, 1971 (Pub. 8567). It lists bilateral agreements between the United States and 155 countries grouped under 82 subjects.

There is no annual compilation of multilateral treaties—or of bilateral treaties for that matter—which remain open for signature or ratification, or both, by the United States. The Office of the Legal Adviser did prepare a memorandum in 1963 entitled "Treaties signed by the United States that are not yet in force as of February 6, 1963" (2 I.L.M. 284), dividing them into treaties not yet submitted to the Senate, treaties pending before

the Senate and treaties approved by the Senate but not yet in force. The Committee is considering the desirability of recommending to the Department some form of periodic compilation concerning treaties which have been opened for signature and remain under consideration by the United States Government.

*Far Horizons* continues to be published as a bimonthly newsletter by the Office of External Research of the Department for the Foreign Area Research Co-ordination Group. The issue for January, 1971, includes a five-year table on Federal funding of research on foreign areas and international affairs for fiscal years 1966-1970, with a breakdown showing the amounts expended by each agency. The aggregate amount for fiscal year 1970 is slightly under \$21 million, which is more than \$12 million lower than the amount of Federal funding for any of the previous four years.

*Papers Available* is the monthly accessions list published by the Foreign Affairs Research Documentation Center of the Office of External Research of the Department and, although primarily for government distribution, is also furnished to private scholars and academic institutions as a service to the research community. The Center systematically collects unpublished and occasional papers on foreign area research in the social and behavioral sciences from sources both within and outside the Government. Scholars and research organizations are invited to send papers prepared for academic and professional meetings and other recently completely unpublished studies for possible inclusion in the Documentation Center to Room 8642, Department of State, Washington, D. C. 20520. Persons outside of the Government wishing to obtain a copy of a listed study should apply to the Federal agency sponsoring the study or, if the study is not Federally sponsored, to the author of the study or to the sponsoring private research institution.

*Alternative Methods for Delimiting the Outer Boundary of the Continental Shelf* by Lewis M. Alexander is a study prepared in February, 1970, under contract with the Department of State. The Office of External Research has a limited supply of copies of this paper. Anyone wishing to obtain it should write to that office, Room 8840, U. S. Department of State, Washington, D. C. 20520.

*Government-Supported Research: International Affairs: Research Completed and in Progress July 1969-June 1970* was published in January, 1971, by the Office of External Research of the Department. It is a 216-page booklet with a geographic index and a contractor, researcher and title index. The listing of the research projects is arranged by subject. Law is one of the subjects appearing in the table of contents, but accounts for only three of the 623 projects. One of the three is an analysis of the legal and institutional aspects of the Mekong Basin Development agreements, which is expected to be completed in November, 1971.

PUBLICATIONS OF U. S. DEPARTMENTS AND AGENCIES  
(Other than the Department of State)

*The Ninth Annual Report to Congress of the United States Arms Control and Disarmament Agency* for the calendar year 1969 was released in

April, 1970 (ACDA Pub. 54). It includes the following topics: strategic arms limitations talks; nuclear arms control proposals; chemical and biological weapons control; arms control measures for the seabed; nonproliferation of nuclear weapons; conventional arms and military expenditures; and mutual and balanced force reductions in central Europe.

*Documents on Disarmament 1969* was released by the Arms Control and Disarmament Agency in August, 1970, as ACDA Pub. 55. It runs to 821 pages, of which 765 pages are documents arranged topically under the following headings: Agency for the Prohibition of Nuclear Weapons in Latin America; Communist China; Conference of the Committee on Disarmament (Eighteen Nation Disarmament Committee); Federal Republic of Germany; Finland; International Atomic Energy Agency; North Atlantic Treaty Organization; Soviet Union; Strategic Arms Limitation Talks; Treaties and other international agreements; United Nations; United States; and Warsaw Pact. There are also a chronological list of documents, a bibliography, a list of persons, and an index.

*Arms Control & Disarmament*, a quarterly bibliography with abstracts and annotations, is going into its seventh year of publication. It is prepared by the Arms Control and Disarmament Bibliography Section of the Library of Congress, through the support of the U. S. Arms Control and Disarmament Agency. The issue for winter 1970-1971 contains 120 pages. Sources surveyed include trade books, monographs, selected Government publications, publications of national and international organizations and societies, and about 1,200 periodicals. The subject is construed to encompass "related topics such as weapons development and basic factors in world politics." The 13-page index reveals that a wide range of international law topics are considered to be related to arms control and disarmament.

*Arms Control and National Security* is the second edition of a report aimed to acquaint the general public with the activities of the U.S. Arms Control and Disarmament Agency, replete with photographs of international conferences and scientists in nuclear power stations. It was released in August, 1970, as ACDA Pub. 49.

*The Foreign Assistance Program: Annual Report to the Congress—Fiscal Year 1970* was forwarded by the President to the Congress in February, 1971. Commitments for economic assistance by AID for fiscal year 1970 amounted to \$1.88 billion, as compared with \$1.69 billion for 1969. Total U.S. assistance commitments—AID commitments combined with those of economic assistance not included in the Foreign Assistance Act—totaled \$3.7 billion. The report includes a chapter on the military assistance program.

#### CONGRESSIONAL COMPILATIONS

*Legislation on Foreign Relations with Explanatory Notes*, prepared annually as a joint print of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, was published April 20, 1970.

Those interested in international affairs cannot, of course, limit their sources to the Senate Committee on Foreign Relations and the House

Committee on Foreign Affairs, for many different committees of the Congress may in any particular year publish significant reports or compilations. For example, the Senate Committee on Public Works published in January, 1971, a compilation entitled *Oil Pollution of the Marine Environment: A Legal Bibliography*, 92nd Cong., 1st Sess. (Committee Print, 1971).

Unfortunately, no one Congressional source contains a listing of the Congressional publications of interest to members of the American Society of International Law, and the volume of such material clearly precludes a listing in any report such as this one.

The final edition of the *Legislative Calendar* of each of the committees of the Congress does, however, offer a summary of its publications and activities during a session of Congress. For example, the *Legislative Calendar* (Final Edition, January 18, 1971, No. 16) of the Senate Committee on Foreign Relations provides a cumulative record for the 91st Congress of the treaties, Executive reservations and Executive understandings pending before the Committee (some 42 items in all), the Executive communications to the Committee (some 86 items) and the Committee's publications during the 91st Congress (17 Executive Reports, 35 Senate Reports, three Senate Documents, 59 Hearings, and 29 Committee Prints). Listed are compilations such as *Background Information Relating to Southeast Asia and Viet-Nam*, 6th revised edition, published in June, 1970, and *Documents Relating to the War Power of Congress, the President's Authority as Commander-in-Chief and the War in Indochina*, published in July, 1970. The last publication of the Senate Committee in the 91st Congress was *Security Agreements and Commitments Abroad: Report of Subcommittee to Full Committee*, December 21, 1970.

#### UNITED NATIONS PUBLICATIONS

##### *In General*

The United Nations' document-limitation problems are illustrated in a letter from a member of the French Translation Section to the Editor of the *Secretariat News* (Vol. XXVI, No. 1, Jan. 15, 1971, p. 3):

To the editor:

Working on a Sunday can be fun: sometimes you have an opportunity to dig deeper. Last December 6th, I found myself translating a letter dated 12/5 from a Member State to the Security Council President, requesting participation in the Council's meeting scheduled for that very day. Intrigued by the fact that translation of that document (S/10021) was due 1 day after the meeting had taken place and further surprised that distribution was due 12/7, I began to ponder: other language units were kept busy doing the same exercise, other typing pools were transcribing it, other revisers revising it, other sections duly recording the various stages of this momentous work in progress, and all that after it had lost all practical value. I enquired and found out that we were *not* working in a vacuum: said document was to be run off in all working languages for a total output exceeding 4,500 copies! Can anyone guess where these thousands of copies will end up?

An official admission of document proliferation is found in a Secretariat report, A/8126 at 8, where plans are described for the 1971 Fourth International Conference on the Peaceful Uses of Atomic Energy:

Total contributions to the Conference would be limited to 500 papers not exceeding 3,000 words each in length, together with a 300-word abstract of each paper. The papers would be submitted in one of the four languages of the Conference; 300 of them would be selected for oral presentation and would be issued in the language of submission. The 500 abstracts would be issued in the language of submission. [sic] The 500 abstracts would be issued in the four languages. The 500 papers would be printed in the proceedings of the Conference in their language of submission, together with 400 pages of summaries and discussions in four languages. The United Nations Scientific Advisory Committee, at its session held in April 1970, concluded that the extreme difficulty in compressing the desired information into 3,000 words would in many cases severely restrict the value of the Conference. The Committee accordingly put the matter in the hands of the combined Secretariat of the United Nations and the International Atomic Energy Agency to work out a suitable proposal whereby the papers could be allowed a maximum of 5,000 words each, while keeping within the budgetary limits.

The proposal to limit documentation by using minutes in place of summary records, reported by this Committee a year ago, 1970 Proceedings, Am. Soc. Int. Law at 304, was endorsed by the Advisory Committee on Administrative and Budgetary Questions, but only after two other alternatives are found unacceptable, "complete elimination of records or resort to internal minutes." (Doc. E/4802/Add. 2 at 1.) The ACABQ's view that "minutes should wherever possible be couched in impersonal terms" had not been followed by the Population Commission, whose 1969 "minutes" refer by name to what each speaker said and so resemble shortened summary records, especially since the Commission had decided that "(d)elegations would be free to submit any corrections to those minutes within seventy-two hours of their appearance." (Doc. E/CN.9/MIN. 219-236 at 5.)

The ACABQ also expressed the view that there are "bodies, such as expert groups, which need no more than internal notes to help the Rapporteur or Secretary to draft the body's report; in such cases the provision of minutes, let alone of summary records would be wasteful; . . ." (E/4902/Add. 2 at 2.) Actually, even the reports of expert groups, except for the attendance and texts formally adopted, may be wasteful. For example, the valuable time consumed in the Subcommission on the Prevention of Discrimination and Protection of Minorities at its 1969 and 1970 sessions in debating how to describe its own debates could far better have been devoted to substantive matters. (Docs. E/CN.4/1008-E/CN.4/Sub. 2/305 (1969, 101 pages); E/CN.4/1040-E/CN.4/Sub. 2/316 (1970, 134 pages).)

Surely any participant who is concerned that his own debating points



be noticed can best rely on the usual tape recording. In any event, the Legal Committee's report on the rôle of the World Court was expanded to "include a summary of views expressed in the debate" (Doc. A/8238 at 3) over opposition from the U.S.S.R. and Tanzania. See Press Release GA/L/1438 at 5-6 (Nov. 18, 1970).

Sometimes U.N. documentation is limited for reasons other than economy. The Sub-Committee on petitions of the General Assembly's decolonization committee decided not to circulate as a petition a letter on Southern Rhodesia "because it contained offensive remarks about Member States and about freedom fighters." (Doc. A/AC.109/L.639 at 5.) The Sub-Committee did, while planning its work for 1970, examine "the question of establishing criteria and working principles to guide its work. The Sub-Committee agreed to give further consideration to the problem at subsequent meetings." (*Ibid.* at 6.) It seems high time, since there is now a revised edition of the Secretariat's model rules of procedure for U.N. bodies dealing with violations of human rights. (Doc. E/CN.4/1021/Rev. 1.)

The American Society of International Law should give attention to the United Nations' efforts to set procedural standards. Not only are the model rules available for comment, but also three competing sets in the Subcommission on Discrimination and Minorities. (Doc. E/CN.4/1040-E/CN.4/Sub. 2/316 at 75-77, 82-84.) The rules of procedure of the Committee on the Elimination of Racial Discrimination, whose non-publication was criticized in last year's report of the present committee (1970 Proceedings, Am. Soc. Int. Law at 302), and in a resolution adopted by the Society, have now been published (GAOR, 25th Sess., Supp. 27 (A/8027) Annex 2 (1970)), and deserve scholarly scrutiny. Unfortunately the Special Committee on the Rationalization of the Procedure and Organization of the General Assembly decided to work in closed meetings, with press communiqués "whenever the Committee wished to provide information on the progress of its work." (Press Release GA/4363, Feb. 11, 1971.)

### *International Agreements*

Agreements written or effective during the past year cover a variety of fields. A fourth International Tin Agreement was negotiated at a spring, 1970, conference under the auspices of the U.N. Conference on Trade and Development (UNCTAD). A draft convention on liability for damage caused by space objects was approved in July by the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space. In November the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity came into effect. The International Civil Aviation Organization wrote a draft on hijacking. The Soviets issued a revised draft convention on chemical and biological warfare (Doc. A/8136).

In February, 1971, there was opened for signature the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons

of Mass Destruction on the Sea-Bed and the Ocean Floor and the Subsoil Thereof. An International Wheat Agreement, 1971, was concluded by a 53-nation UNCTAD Conference in Geneva, while a Vienna Conference adopted a Convention on Psychotropic Substances.

### *Codification and Development of Law*

General Assembly Resolution 2634 (XXV) summarized the International Law Commission's work as of late 1970: completion of provisional Draft Articles on Relations between States and International Organizations, continued consideration of Succession of States and State Responsibility, and inclusion in its program of treaties between states and international organizations or between two or more of the latter. The Assembly endorsed the International Law Commission's request for new editions of *The Work of the International Law Commission* (Sales No.: 67.v.4), and the "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7).

The present committee wonders whether International Law Commission documentation could not be published more promptly. Only in March, 1971, on the eve of the International Law Commission's 23rd session, scheduled for April 26 to July 30, 1971, have the following, bearing dates from January through May, 1970, been published: review of previous work on codification of international responsibility of states (Doc. A/CN.4/217/Add. 1); third report on succession in respect of treaties (Doc. A/CN.4/224); second report on the most-favored-nation clause (Doc. A/CN.4/228/Add. 1); succession of states in respect of bilateral treaties (Doc. A/CN.4/229); review of the Commission's program of work and of topics recommended or suggested for inclusion (Doc. A/CN.4/230); and the second report on state responsibility (Doc. A/CN.4/233). A December, 1970, document on treaties between states and international organizations or between two or more of the latter was published as early as February, 1971 (Doc. A/CN.4/L.161).

The Commission on International Trade Law (UNCITRAL) was asked by the General Assembly in Resolution 2635 (XXV) to continue its work on the international sale of goods, payments, commercial arbitration and legislation on shipping. In preparation for UNCITRAL's 4th session, which began on March 29, 1971, a number of documents were issued: report on possible content of uniform rules applicable to a special negotiable instrument for optional use in international transactions (Doc. A/CN.9/48); report of working group on time-limits and limitations (prescription) in the international sale of goods (Doc. A/CN.9/50); report of working group on international sale of goods (Doc. A/CN.9/52); and training and assistance in the field of international trade law (Doc. A/CN.9/58).

After years of discussion, the General Assembly was able to mark the United Nations' 25th anniversary by adopting a Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Doc. A/RES/2625 (XXV)). Denmark told the Legal Committee that "the con-

spicuous absence of any reference" to the World Court showed that an essential element in pacific settlement of international disputes was not accepted by a large number of countries (Press Release GA/L/1418). The Assembly adopted a Declaration on the Strengthening of International Security, recommending "that Member States support the efforts of the Special Committee on the Question of Defining Aggression to bring its work to a successful conclusion." (Doc. A/RES/2734 (XXV).) That Committee began its 4th session on February 1, 1971.

A Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction was adopted in Assembly Resolution 2749 (XXV), while in Resolution 2750 C (XXV) it decided to convene in 1973 a Conference on the Law of the Sea to establish international machinery for that area and its resources. Earlier the Secretariat had published: text of the Montevideo Declaration on the Law of the Sea, a study on international machinery (Doc. A/AC.138/23); a note on possible methods for sharing the proceeds of exploitation (Doc. A/AC.138/24), and a report on marine pollution from exploitation of the subsoil (Doc. A/7924).

As regards the law of war, the Assembly adopted Resolution 2675 (XXV) which "affirms the following [enumerated] basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict." Assembly Resolution 2677 (XXV) expressed the hope that the conference of governmental experts to be convened in 1971 by the International Committee of the Red Cross would consider further what development is required in existing humanitarian laws applicable to armed conflicts.

The Subcommission on Discrimination and Minorities adopted principles on equality in the administration of justice (Doc. E/CN.4/1040-E/CN.4/Sub.2/316 at 99-107). The difficulties encountered in the codification of principles of equality were illustrated by the terse reply of Malawi to a Secretariat inquiry on implementation: "Malawi does not support the Declaration on the Elimination of Discrimination against Women." (Doc. E/CN.6/531/Add. 1 at 49.)

#### *Recurrent Publications*

The United Nations' Joint Inspection Unit is in the process of gathering opinions on the usefulness of a list of recurrent publications including several of legal content: the *Treaty Series* and Cumulative Index, *Status of Multilateral Conventions*, *Reports of International Arbitral Awards*, *U.N. Legislative Series*, *U.N. Juridical Yearbook*, *International Tax Agreements*, *International Review of Criminal Policy*, *Bulletin on Narcotics*, the *Yearbook on Human Rights*, and the U.N. Industrial Development Organization's *Legislative Series*. The results are to be reported in 1971 to the General Assembly, whose Resolution 2732 (XXV) invited the Unit to draw attention to publications "which appear to have lost their useful-

ness or have become redundant or whose value may not measure up to the cost involved in continuing them."

The *Human Rights Bulletin*, whose appearance was mentioned in this Committee's 1970 report, has continued through Number 4, which undertakes in 63 pages to cover human rights activities in the second half of 1970 at the United Nations and specialized agencies, besides listing official documents and tallying treaty ratifications. The material included could be more complete if space were not limited. For example, Rumania's approval of the Racial Discrimination Convention is noted but not its reservation against the World Court's compulsory jurisdiction, the text of which can be found outside the depository itself only in a mimeographed document, A/8062/Add. 1.

The *Human Rights Bulletin* still does not match in size, content or paper quality the Office of Public Information's *Objective: Justice*, with its photographs and signed articles attacking *apartheid* and colonialism. Excerpts from South African newspapers are included in a section entitled "News and Views." Another series on *apartheid* is the "Notes and Documents" issued by the Unit on Apartheid of the U.N. Department of Political and Security Council Affairs, of which 26 were issued in 1970. Signed articles are frequent.

Since private opinions are so readily published by the United Nations in the area of racial discrimination, the only reason private opinions could not also be officially published in other areas is the lack of the kind of near-unanimity which exists against racism.

The need remains for a journal of legal opinion on a variety of United Nations problems. The official *United Nations Monthly Chronicle* amounts at present to "advance sheets" for the *United Nations Yearbook*, much needed because of the delay in *Yearbook* publication, and reproduction in print of the Secretary General's mimeographed press releases. If institutional strictures preclude official issuance of any but the official line, then a United Nations law journal should be privately issued. It could begin with the simple reproduction of legal arguments presented in United Nations bodies. An example would be the reactions of various countries to the proposed United Nations "grand jury" to "indict" persons, presumably white South Africans, for crimes committed in Namibia (South West Africa). The proposal appeared in Document E/CN.4/979/Add. 3, and the U.S. and Italian reactions in Documents A/8057 and Add. 1.

Unofficial periodical reporting on legally relevant U.N. activities and documentation is in its fifth year.<sup>1</sup> Recently there has been added an unofficial monthly checklist of human rights documents from the United Nations and other international organizations.<sup>2</sup>

The first volume of the *UNCITRAL Yearbook* (Sales No.: E. 71 v.I, Vol.

<sup>1</sup> United Nations Law Reports issued monthly by Walker Publishing Co., 720 Fifth Avenue, New York, N. Y. 10022, and edited by the Chairman of this committee.

<sup>2</sup> Published monthly by the United States Institute of Human Rights, 13th floor, 200 Park Avenue, New York, N. Y. 10017.

1) was expected at the fourth session of the U.N. Commission on International Trade Law, which began on March 29, 1971, as was the first volume of UNCITRAL's *Register of Texts*. The table of contents of the proposed second volume of the Register has been published in an annex to Document A/CN.9/56. The Secretariat has also studied a proposed bibliography on international trade law (Doc. A/CN.9/L.20 and Add. 1).

### *Reports, Articles and Memoranda*

Taxation was studied from several viewpoints: U.S. income taxation of private investment in developing countries (Doc. ST/ECA/126); harmonization of fiscal incentives to industry in the Caribbean Free Trade Association area (Doc. E/CN.12/845); and technical assistance in tax reform. Legal problems in container transport were dealt with in ECOSOC Report Document E/4796. Natural resource exploitation with foreign capital and technology was described in Document A/8058, with 70 pages on contractual arrangements with foreign investors.

Studies for the Fourth (August, 1970) U.N. Conference on the Prevention of Crime and Treatment of Offenders included "The Standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field" (Doc. A/CONF. 43/3). Studies for the 27th (Feb.-March, 1971) session of the Human Rights Commission included a report on the effect of technological developments on the right of privacy (Doc. E/CN.4/1028/Add. 6). The effect of computers on privacy was discussed in a booklet (Doc. E/4800-ST/ECA/136: Sales No.: E.71.II.A.1 at 73), which also discusses computer-related patent and copyright questions.

An opinion of the U.N. Legal Counsel on suspension of South Africa from participation in General Assembly meetings through rejection of its credentials was issued as Document A/8160. A memorandum of the Organization of African Unity (Doc. S/10132), concluded that under the "Simonstown Agreement" the United Kingdom "has no obligation to sell any more military equipment to South Africa."

Activities by international organizations to promote study of international law were reported in Document A/8130. Included were the Council of Europe, Hague Conference on Private International Law, Institute of International Law, League of Arab States, and the Organization of American States.

### *Specialized Agencies and Regional Organizations*

The few publications listed in this section are far from complete and may serve at most as illustrations of what is available. The specialized agencies presented analytical reports at the mid-1970 meeting of the Economic and Social Council, through which any legally relevant activities could be traced: ILO, E/4826 and Add. 1 (also E/4885); WHO, E/4847; UNESCO, E/4843; ICAO, E/4849; UPU, E/4830; ITU, E/4848; WMO, E/4851; IMCO, E/4850; IAEA, E/4821 and Add. 1; FAO, E/4852 and Add. 1.

The International Center for Settlement of Investment Disputes issued its fourth annual report, 1969/1970, which includes a legal bibliography. By September 15, 1970, the number of signatories to the 1965 Convention on the Settlement of Investment Disputes was 65, with 59 ratifications. No disputes had been submitted to the Center, but provision for submission had been made in a number of investment contracts between developing states and foreign private investors. The Center has begun collecting national legislation and international agreements on foreign investment, and has issued model contract and treaty clauses. The *travaux préparatoires* of the convention has been published.

The Council of Europe and Organization of American States issued catalogues of publications for 1970 and 1970-1971 respectively. The former includes items like the *European Treaty Series*, human rights, and law and criminology. The latter lists documents on bilateral treaty developments in Latin America, third-party liability in the field of nuclear energy, the *Anuario Jurídico Interamericano*, mining and petroleum legislation in Latin America, copyright protection in the Americas, and *cooperación internacional en procedimientos judiciales*.

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1970-71 ANNUAL REPORT  
OF THE  
ASSOCIATION OF STUDENT INTERNATIONAL LAW SOCIETIES

The officers of the Association directed their primary efforts this year to programs which would reverse what they perceived to be a diminishing student interest in international law. Experimentation with new ideas was undertaken, and promising possibilities have arisen, as well as a number of not-so-promising ones.

The 1970-71 Executive Committee was composed of Douglas P. Wachholz (President), Francis H. Clabaugh (Vice President), Jonathan C. S. Cox (Secretary), Howard B. Hill (Treasurer), and J. Robert Steelman (Executive Secretary). Mr. Steelman co-ordinated the Committee's activities as the second Henry R. Luce Fellow of the American Society of International Law. The success of the year's program would have been impossible without his dedicated work.

The most important projects that the Association's officers initiated were designed to increase student and younger member participation in the activities and governance of the American Society of International Law. It was strongly felt that there are too few ASIL activities in which the student and other younger members can actively participate, and that the international community suffers by not more actively cultivating their interests. Upon request of the Association, the Society co-sponsored a round table with the ASILS during their concurrent annual meetings. The subject of the round table was "The Dilemma of Foreign Investment in South Africa." Participants included Congressman Charles C. Diggs, Jr., Chairman of the Subcommittee on Africa of the House Foreign Affairs Committee; Robert S. Smith, Deputy Assistant Secretary of State for African Affairs; Joel Carlson, a civil rights lawyer formerly of Johannesburg, South Africa; Pierce Newton-King, a practicing attorney from Johannesburg, South Africa; and two law students, Julius Duru of the University of Denver Law School and John N. Brander of the Georgetown University Law Center. The president served as chairman and Emile Julian of Howard University Law School served as reporter.

The Association officers proposed to the Executive Council at the Annual Meeting that it add student members and members under thirty years of age, whenever feasible, to committees and study panels of the Society. This proposal was transmitted to the Society's Committee on Student and Professional Development for its consideration.

A project to encourage member societies to contribute studies on matters before the United Nations Economic and Social Council was discussed with CIRUNA, the student arm of the United Nations Association of the United States of America. Another similar project was explored: to give member societies an opportunity to provide an input into foreign-policy decision-making through submission of testimony on certain issues to various

organs of the Federal Government, such as the House Foreign Affairs and Senate Foreign Relations Committees. This project was not successful.

Other on-going projects included further ASILS planning toward the publication of a booklet of uniform citations to principal foreign legal references, revision of the Association's list of employment opportunities in the field of international law, the expansion of the Jessup Competition to include a team from Ethiopia, and heightened co-operation with law students in other countries.

An effort was made to obtain simultaneous translation for the final rounds of the Jessup Competition in order more fully to "internationalize" the competition and equalize the burden on foreign competitors. Unfortunately, this was not financially possible. Further efforts were made through the ASILS *Newsletter* to enable the Association more fully to serve as a clearing house for information among member societies. And, in addition, the Executive Secretary through his personal contacts provided assistance to individual societies on many different matters.

Six student societies formed during the 1969-70 academic year were admitted this year to membership in the Association: James T. Brand International Law Society (Stetson University College of Law); Southern University International Law Society; Francis Deak International Law Society (Rutgers University School of Law—Camden); Lovola of New Orleans Society of International Law; University of Kentucky International Law Society; and University of South Carolina International Law Society.

Efforts were made to assist student international law journals by conveying articles to them from law students, by providing helpful information to them, by serving as a clearing house of information among them, and by sponsoring the second annual workshop for editors in April. A special effort was made by the Executive Secretary to help out the two new student journals which were founded this year, bringing the total number to fifteen.

The officers spent a portion of one of two Executive Committee meetings discussing the alternatives for budgeting and financing after it was learned that the three-year grant from the Henry Luce Foundation was non-renewable. The grant's funds will terminate this year; for the time being, economies effected by the ASILS and assistance by the Society assure the continuation of the Executive Secretary's position and the Jessup Competition.

The eleventh annual Philip C. Jessup International Law Moot Court Competition included over sixty teams from five countries (Argentina, Canada, Ethiopia, the United Kingdom, and the United States), approximately the same number entered in the 1970 rounds. The competition concerned a hypothetical case coming before the International Court of Justice (*Aegea-Barcelona v. Franconia*) involving questions of treaty interpretation, kidnapping and terrorism, diplomatic immunity, and jurisdiction incident to an aerial hijacking incident. The semifinal and final rounds were held April 28–May 1 at the Georgetown University Law Center and the Statler-Hilton Hotel in Washington, D. C.



The University of Texas won the competition, and the University of California (Davis) was runner-up. David P. Seikel of the University of Texas was declared the best oralist in the semifinal and final rounds. Vanderbilt University won the award for the submission of the best written memorials. Judges for the final round were Supreme Court Justice Byron R. White (President); Najeeb E. Halaby, President of Pan American World Airways, and Charles S. Rhyne, President of the World Peace Through Law Center (Members of the Court). A noteworthy feature of this year's highly successful competition was the inclusion of a substantial number of foreign lawyers as judges in the semifinal round of the competition.

In conclusion, there is much reason to be optimistic about the future growth of the Association. It is in a unique position to reinvigorate a shaken enthusiasm among students for law as a vehicle for solving international problems. It also has the potential of being a strong, positive influence within the American Society of International Law, where it can assist in bringing students into the Society's community of scholars. This responsibility should maintain a high level of excitement in the Association for quite some time to come. I look forward to the program of the new officers.

This report is submitted with special gratitude to Stephen M. Schwebel, the Executive Director of the American Society of International Law and J. Robert Steelman, the Society's Luce Fellow, who have been so extremely helpful and courteous to me in my tenure as President of the Association.

Respectfully submitted,

DOUGLAS P. WACHHOLZ

*President, 1970-1971*

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## AN ACT

### TO INCORPORATE THE AMERICAN SOCIETY OF INTERNATIONAL LAW, AND FOR OTHER PURPOSES

(P.L. 794, 81st Cong., Ch. 958, 2d Sess. [H.R. 7990], 64 Stat. 869)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following persons, citizens of the United States and members of the executive council of the unincorporated association known as the American Society of International Law, to wit: Manley O. Hudson, of Cambridge, Massachusetts, president of the said society; Dean G. Acheson, of Washington, District of Columbia, honorary president of the same; George A. Finch, of Chevy Chase, Maryland; Edwin D. Dickinson, of Philadelphia, Pennsylvania; and Philip C. Jessup, of New York, New York; vice presidents of the same; Philip Marshall Brown, of Washington, District of Columbia; Frederic R. Coudert, of New York, New York; William C. Dennis, of Richmond, Indiana; Charles G. Fenwick, of Washington, District of Columbia; Cordell Hull, of Washington, District of Columbia; Charles Cheney Hyde, of New York, New York; Robert H. Jackson, of McLean, Virginia; Arthur K. Kuhn, of New York, New York; George C. Marshall, of Leesburg, Virginia; Henry L. Stimson, of New York, New York; Elbert D. Thomas, of Salt Lake City, Utah; Charles Warren, of Washington, District of Columbia; George Grafton Wilson, of Cambridge, Massachusetts; and Lester H. Woolsey, of Chevy Chase, Maryland; honorary vice presidents of the said society; Edward Dumbauld, of Uniontown, Pennsylvania, secretary; and Edgar Turlington, of Chevy Chase, Maryland, treasurer of the same; Edward W. Allen, Seattle, Washington; Mary Agnes Brown, of Washington, District of Columbia; Florence Brush, of Bronxville, New York; Kenneth S. Carlston, of Urbana, Illinois; Ben M. Cherrington, of Denver, Colorado; Percy E. Corbett, of New Haven, Connecticut; Willard B. Cowles, of Lincoln, Nebraska; William S. Culbertson, of Washington, District of Columbia; John S. Dickey, of Hanover, New Hampshire; Alwyn V. Freeman, of Los Angeles, California; Ernest A. Gross, of Manhasset, New York; Stanley K. Hornbeck, of Washington, District of Columbia; A. Brunson MacChesney, of Chicago, Illinois; William Manger, of Washington, District of Columbia; Charles E. Martin, of Seattle, Washington; John Brown Mason, of Oberlin, Ohio; Myres S. McDougal, of New Haven, Connecticut; Hans J. Morgenthau, of Chicago, Illinois; Durward V. Sandifer, of Chevy Chase, Maryland; Francis B. Sayre, of Washington, District of Columbia; Carl B. Spaeth, of Palo Alto, California; Robert B. Stewart, of Medford, Massachusetts; and Albert C. F. Westphal, of Albuquerque, New Mexico; and such other persons as are now members of the said society, and their successors, are hereby created and declared to be a body corporate, by the name of *The American Society of International Law*.



### PURPOSES

SEC. 2. The purposes of the corporation are and shall be to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. The corporation shall not be operated for profit, and no part of its income or assets shall inure to any of its members, or its officers or other members of its executive council, or be distributable thereto otherwise than upon dissolution or final liquidation of the corporation. The corporation, and its officers and other members of its executive council shall not, as such, contribute to or otherwise support or assist any political party or candidate for elective public office.

### EXECUTIVE COUNCIL AND OFFICERS

SEC. 3. The governing board of the corporation, subject to the directions of the corporation at its annual meetings and at such other meetings as may be called pursuant to the provisions of its constitution, bylaws, and regulations, hereinafter mentioned, shall be an executive council consisting of a president, an honorary president, a number of vice presidents and honorary vice presidents to be determined by the constitution of the corporation, a secretary, a treasurer, and not less than twenty-four additional persons. The officers of the corporation and one-third of the other members of the executive council shall be elected at each annual meeting of the corporation: *Provided, however,* That the executive council may be authorized by the constitution of the corporation to elect the secretary and the treasurer of the corporation for specified terms and to fill vacancies until the next annual meeting of the corporation. The number of members of the executive council shall initially be forty-four, and the members of the said council shall initially be the persons whose names and addresses are set forth in section 1 hereof.

### PRINCIPAL OFFICE AND ACTIVITIES

SEC. 4. The corporation shall have its principal office in the District of Columbia and shall have the right to conduct its activities in the said District and at any other place or places in the United States.

### CORPORATE SUCCESSION AND POWERS

SEC. 5. The corporation shall have succession by its corporate name and shall have power to sue and be sued, complain and defend in any court of competent jurisdiction; to adopt, use, and alter a corporate seal; to choose such officers, managers, and agents as its business may require; to adopt, amend, apply, and administer a constitution, bylaws, and regulations, not inconsistent with the laws of the United States of America or any State in which the corporation is to operate, for the management of its property and the regulation of its affairs; to contract and be contracted with; to take and hold by lease, gift, purchase, grant, devise, or bequest, in full title, in trust, or otherwise, any property, real or personal, necessary for attaining the objects and carrying into effect the purposes of the corporation, subject,

however, to applicable provisions of law of any State (A) governing the amount or kind of real and personal property which may be held by, or (B) otherwise limiting or controlling the ownership of real and personal property by, a corporation operating in such State; to transfer and convey real or personal property; to borrow money for the purposes of the corporation, and issue bonds therefor, and secure the same by mortgage subject in every case to all applicable provisions of Federal or State laws; to publish a journal and other publications, and generally to do any and all such acts and things as may be necessary and proper in carrying into effect the purposes of the corporation.

#### LIABILITY FOR ACTS OF OFFICERS AND AGENTS; SERVICE OF PROCESS

SEC. 6. The corporation shall be liable for the acts of its officers and agents. It shall have in the District of Columbia at all times a designated agent authorized to accept service of process for the corporation; and notice to or service upon such agent, or mailed to the business address of such agent, shall be deemed notice to or service upon the corporation.

#### ISSUES OF STOCK, DECLARATION AND PAYMENT OF DIVIDENDS, LOANS TO OFFICERS AND MEMBERS OF EXECUTIVE COUNCIL PROHIBITED

SEC. 7. The corporation shall not issue shares of stock, nor declare or pay dividends, nor make loans or advances to its officers or members of its executive council or any of them. Any member of its executive council who votes for or assents to the making of a loan or advance to an officer of the corporation or to a member of its executive council, and any officer or officers participating in the making of any such loan or advance, shall be jointly and severally liable to the corporation for the amount of such loan or advance until the repayment thereof.

#### BOOKS AND RECORDS

SEC. 8. The corporation shall keep correct and complete books and records of account. It shall also keep minutes of the proceedings of its members, executive council, and committees having any of the authority of the said council. It shall also keep at its principal office a record giving the names and addresses of its members entitled to vote. All books and records of the corporation may be inspected by any member or his agent or attorney, for any proper purpose, at any reasonable time.

#### ANNUAL AUDIT

SEC. 9. There shall be an annual audit of the financial transactions of the corporation and of the pertinent books and records of the corporation by a certified public accountant, at the expense of the corporation, and the said audit shall be filed with the Congress.

#### DURATION

SEC. 10. The duration of the corporation shall be perpetual.

# ACQUISITION OF ASSETS OF EXISTING AMERICAN SOCIETY OF INTERNATIONAL LAW

SEC. 11. The corporation may and shall acquire all of the assets of the existing unincorporated association known as the American Society of International Law, subject to any liabilities and obligations of the said association.

## RESERVATION OF RIGHT TO ALTER, REPEAL, OR AMEND

SEC. 12. The right to alter, repeal, or amend this Act is hereby expressly reserved to Congress.

*Approved September 20, 1950.*

*Resolution Adopted by the American Society of International Law,  
a Corporation, at its Annual Meeting on April 28, 1951*

RESOLVED, That:

(a) The corporation accepts incorporation provided for in the Act of Congress approved September 20, 1950 (Pub. Law 794, 81st Congress, Chap. 958, 2d Session, 64 Stat. 869).

(b) The corporation adopts as its constitution, bylaws and regulations the constitution, bylaws and regulations of the American Society of International Law, an unincorporated association.

(c) The persons now serving as President, Honorary President, Vice Presidents, Honorary Vice Presidents, Secretary, Treasurer, Assistant Treasurer, Executive Secretary, and members of the Executive Council of the said unincorporated association shall serve in the same capacities on behalf of the corporation from the date of the said meeting until the expiration of the periods for which they were chosen by the said unincorporated association.

(d) The committees and employees of the unincorporated association shall become committees and employees of the corporation on the date of the transfer of the property and business of the association to the corporation.

(e) The corporation adopts as its seal the seal of the unincorporated association, with appropriate modifications.

(f) The corporation designates as its agent in the District of Columbia, to accept service of process for the corporation, William S. Culbertson, a member of the corporation residing at 2101 Connecticut Avenue, N. W.<sup>1</sup>

(g) The corporation authorizes Lester H. Woolsey and Charles G. Fenwick to accept for the corporation the property and business of the unincorporated association, subject to all liabilities and obligations of the association, and to execute and deliver any and all instruments which may be necessary or desirable in connection with the acceptance of the said property and business.<sup>2</sup>

<sup>1</sup> Deceased. The Executive Council on Nov. 18, 1967, designated the Executive Director of the Society as its agent to accept service of process.

<sup>2</sup> For documents and proceedings completing the incorporation of the Society, see *PROCEEDINGS*, 1951, pp. 195, 204-212.

CONSTITUTION  
OF  
THE AMERICAN SOCIETY OF INTERNATIONAL LAW<sup>1</sup>

(Adopted by the incorporated Society April 28, 1951;  
as amended to May 1, 1971)

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ARTICLE I

*Name*

This Society shall be known as The American Society of International Law.

ARTICLE II

*Object or purpose*

The object of this Society is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will co-operate with similar societies in this and other countries.

ARTICLE III

*Membership*

New members may be elected by the Executive Council acting under such rules and regulations as it may prescribe.

*Annual Members.* Annual members may be divided into such classes and shall pay such dues as the Executive Council shall determine and shall thereupon become entitled to all privileges of the Society including copies of the *American Journal of International Law* issued during the year. Upon failure to pay dues for one year a member may in the discretion of the Executive Council be suspended or dropped from membership.

*Life Members.* Upon payment of such amount as the Executive Council shall determine, any person eligible for annual membership may be elected by the Executive Council a life member and shall be entitled to all the privileges of annual members.

*Members Emeriti.* Persons who shall have completed fifty years of membership in the Society may thereafter be declared by the Executive Council *members emeriti* and thereupon shall be entitled to all the privileges of the Society without payment of dues.

*Honorary Members.* Persons not citizens of the United States, who shall have rendered distinguished service to the cause which this Society is formed to promote, may upon nomination of the Executive Council be

<sup>1</sup> The history of the origin and organization of The American Society of International Law can be found in the PROCEEDINGS of the First Annual Meeting at p. 23. The original Constitution was adopted January 12, 1906.

elected to honorary membership by the Society. Only one honorary member may be elected in any one year. Such members have the full privileges of life membership but pay no dues.

*Corporate Non-Voting Members.* Upon payment of such annual dues as the Executive Council shall determine, corporations, partnerships, associations, and organizations of such other kinds as the Executive Council may designate, may be elected members of the Society without the privileges of voting or holding office but with all the other privileges of membership including receipt of the Society's publications.

*Additional Classes of Membership.* The Executive Council may establish additional classes of membership upon such terms and with such dues as it shall determine.

#### ARTICLE IV

##### *Officers*

The officers of the Society shall consist of an Honorary President, a President, such number of Honorary Vice Presidents as may be fixed from time to time by the Executive Council, four Vice Presidents, a Secretary and a Treasurer, all of whom shall be elected annually, but the President shall not be eligible for more than three consecutive annual terms.

The Secretary and the Treasurer shall be elected by the Executive Council. The Executive Council may appoint an Assistant Treasurer, who shall perform the duties of the Treasurer in the event of his absence or incapacity to act. All other officers shall be elected by the Society except as hereinafter provided for the filling of vacancies occurring between elections.

Candidates for all offices to be filled by the Society at each annual election shall be placed in nomination either by a petition signed by not less than twenty members of the Society and submitted at least ninety days in advance of the annual meeting or on the report, submitted at least one hundred and eighty days in advance of the annual meeting, of a Nominating Committee, which shall consist of the five members receiving the highest number of ballots at the business session of the preceding annual meeting of the Society. Nominations for membership on the Committee may be made by the Executive Council or on the floor.

For all offices as to which there is no nomination by petition, election shall be by a single ballot cast by or on behalf of the Secretary of the Society at the business session of the annual meeting. In the event that there is a nomination by petition for any office, that office shall be filled at the annual meeting by a majority vote of the members of the Society, voting either in person or by a postal ballot mailed to the members of the Society at least sixty days before the annual meeting. All officers shall serve until their successors are chosen. The Council may fill vacancies until the next annual meeting of the Society.

#### ARTICLE V

##### *Duties of Officers*

The President shall preside at all meetings of the Society; shall appoint committees, except as otherwise determined by the Executive Council; and

shall perform such other duties as the Executive Council may assign to him. The Executive Council may designate one of the Vice Presidents to serve as Executive Vice President, who shall have responsibility for general executive direction of the Society and shall perform such other duties as the Executive Council may assign him. In the absence of the President his duties shall devolve upon one of the Vice Presidents to be designated by the President, or, if there be no President, or if the President be unable to act, by the Executive Council.

The Secretary shall keep the records and conduct the correspondence of the Society and shall perform such other duties as may be assigned to him by the Society or by the Executive Council.

The Treasurer shall receive and have the custody of the funds of the Society and shall invest and disburse them subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of April.

The officers shall perform the duties prescribed in Article VI or elsewhere in this Constitution.

## ARTICLE VI

### *The Executive Council*

There shall be an Executive Council herein termed the Council. The Council shall have charge of the general interests of the Society and shall possess the governing power except as otherwise specifically provided in this Constitution. The Council shall adopt regulations consistent with this Constitution, appropriate money, and have power to arrange for the issue of publications. The Council shall appoint committees in those cases in which it has reserved that power to itself.

The Council shall consist of the officers of the Society and twenty-four elected members whose terms of office shall be three years. Eight members shall be elected by the Society each year according to the same procedure prescribed for the nomination and election of officers of the Society under Article IV of this Constitution. The service of Council members shall begin at the meeting of the Council immediately following the meeting of the Society at which they are elected. The terms of office and the Council members already elected for those terms at the time this Constitution is revised shall continue unchanged. Elective members of the Council shall be eligible for re-election. Following service for two consecutive terms no elective member shall be eligible for re-election until at least one year after the expiration of his second consecutive term. The Council shall have power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or for other causes. Such appointees shall hold office until the next annual election.

The President of the Society shall be the Chairman of the Council. In case of his absence the Council may elect a temporary chairman.

The Secretary of the Society shall be the Secretary of the Council. He shall keep the records and conduct the correspondence of the Council and shall perform such other duties as may be assigned to him by the Council.

Seven members shall constitute a quorum and a majority vote of those present shall be necessary for decisions.

Meetings of the Council shall be called by the Secretary on instructions of the President, or of a Vice President acting for the President, or upon the written request of seven members of the Council.

## ARTICLE VII

### *Meetings*

Annual meetings of the Society shall be held at a time and place to be determined by the Executive Council. The chief purpose of the meetings is the presentation of papers, and discussions. The Society shall also elect officers and transact such other business as may be necessary.

Special meetings may be held at any time and place on the call of the Executive Council, or of the Secretary upon written request of thirty members. At least ten days' notice of a special meeting shall be given to each member of the Society by mail, such notice to specify the object of the meeting. No other business shall be transacted at such meetings unless admitted by a two-thirds vote of those present and voting.

Fifty members shall constitute a quorum at all meetings and a majority of those present and voting shall be necessary for decisions.

## ARTICLE VIII

### *Resolutions*

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon. Resolutions may be submitted for consideration by the Executive Council in advance of any meeting of the Society by depositing them with the Secretary in due time.

## ARTICLE IX

### *Amendments*

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments may be proposed by the Executive Council. They may also be proposed through a communication in writing signed by at least five members of the Society and deposited with the Secretary within ten months after the previous annual meeting. Amendments so deposited shall be reported upon by the Council at the next annual meeting.

All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon. No amendment shall be voted upon until the Council shall have made a report thereon to the Society.

REGULATIONS  
OF  
THE AMERICAN SOCIETY OF INTERNATIONAL LAW, A CORPORATION

*Adopted April 28, 1951; amended to May 1, 1971*

SECTION I. REGULATIONS ON MEMBERSHIP

1. Any person of good moral character, or organization acceptable to the Executive Council, interested in the objects of the Society may be admitted to membership in the Society.

2. There shall be the following classes of Annual Members: \*

(a) *Regular Members.* Persons eligible for membership not coming within any of the special categories set out below shall be Regular Members. Regular Members resident in the United States shall pay annual dues of \$25, and non-resident Regular Members, dues of \$10.

(b) *Intermediate Members.* Persons eligible for membership who are under 30 years of age at the time of application for membership may be admitted as Intermediate Members and shall pay annual dues of \$15 for the first 5 consecutive years of membership.

(c) *Professional Members.* Persons eligible for membership who are residents of the United States and are primarily engaged in the practice of law and have been members of the Bar for over ten years shall be Professional Members and shall pay annual dues of \$40. Other members, resident or non-resident, admitted to practice may, in their option, become Professional Members and shall pay annual dues of \$40.

(d) *Contributing Members.* Any individual member may become a Contributing Member for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$50.

(e) *Supporting Members.* Any individual member may become a Supporting Member for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$100.

(f) *Student Members.* Persons eligible for annual membership who submit with their applications satisfactory evidence that they are properly qualified graduate or undergraduate students in an institution of higher learning may become Student Members with annual dues of \$7.50. Student membership is valid for one year after the conferring of this membership. Such membership may be renewed from time to time at the discretion of the Executive Director on receiving satisfactory evidence that the person is still regularly enrolled as a student in an institution of higher learning.

3. Any corporation, partnership, association, or other organization acceptable to the Executive Council is eligible for corporate membership for each year in which it pays annual dues of \$1,000 or more.

\* Amendments of Sub-secs. 2-5 of Section I effecting changes in dues for the respective categories of members are effective January 1, 1971.



4. There shall be the following further classes of members who shall not be required to pay annual dues:

(a) *Life Members.* Individual members, or individuals eligible for membership, may become Life Members upon payment to the Society of \$1,000.

(b) *Members Emeriti.* Members of the Society shall be Members *Emeriti* upon completion of fifty years of membership in the Society.

(c) *Honorary Members.* Persons not citizens of the United States, who shall have rendered distinguished service to the cause which this Society is formed to promote, may upon nomination of the Executive Council be elected to honorary membership by the Society. Only one Honorary Member may be elected in any one year. Such members have the full privileges of life membership.

5. There shall be the following classes of Patrons:

(a) *Patrons of the Society.* Upon donation of at least \$5,000 in a single amount, or in contributions since January 1, 1961, in excess of dues aggregating at least \$5,000, or upon filing with the Executive Council satisfactory evidence establishing that the Society has been irrevocably made the beneficiary of such a sum, any individual member or individual eligible for membership may be elected by the Executive Council as a Patron of the Society and shall have the full privileges of life membership. As a token of its appreciation, the Society shall list the names of its Patrons in each issue of the *American Journal of International Law*. A Patron of the Society shall continue to be indicated as such after his death.

Upon the donation of at least \$5,000 in the name of a deceased person who was a member of the Society or was eligible for membership, the Executive Council may declare such person to be a Patron of the Society posthumously. As a token of its appreciation, the Society shall list the names of such Patrons in each issue of the *American Journal of International Law* under the heading, "In Memoriam."

(b) *Annual Patrons.* Any member of the Society or any individual eligible for membership may become an Annual Patron for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$500. An organization eligible for membership may become an Annual Patron for each year in which it contributes at least \$500.

6. An appropriate application shall be submitted on behalf of each new member except an Honorary Member or a Patron.

7. The Executive Director shall add the name of the new member to the roster of members, subject to review by the Executive Council at its next meeting. If the Executive Director sees fit, he may refer the application to the Executive Council and not add the name of the applicant to the roster of members until after favorable action shall have been taken by the Executive Council.

8. A member may transfer his membership from one classification to another upon complying with applicable requirements.

9. Dues shall be payable in January of each year. Upon failure to pay dues before the end of June of the year in which they are payable, any member subject to the obligation to pay dues shall be suspended from membership. If, after such further dues notices during the course of the year as the Executive Director deems appropriate, the member has not paid his dues, the Executive Director shall remove the name of the delinquent from the membership roll. The action of the Executive Director shall be subject to review by the Executive Council at its next meeting.

10. Any individual or organization admitted to membership whose conduct does not conform to the requirements for membership may be suspended or dropped from membership by the Executive Council.

11. All members and patrons in good standing shall be entitled to receive the *American Journal of International Law*, including the *Proceedings* (corporate members being entitled to receive five copies of each).

12. Only natural persons may be voting members.

## SECTION II. REGULATIONS ON EXECUTIVE COUNCIL, EXECUTIVE COMMITTEE, AND BOARD OF REVIEW AND DEVELOPMENT

1. The Executive Council (herein termed the Council) during the intervals between its meetings shall function through an Executive Committee consisting of the President, Executive Vice President, Treasurer, and seven other members of the Council elected annually by the Council.

2. The Executive Committee may appropriate money only within the regulations pertaining to budget and finance.

3. There shall be established a Board of Review and Development which shall, if possible, meet several times a year to review current developments in law affecting public and private relations and transactions across national boundaries and current research and similar activities in these fields, seek to identify problems that in their judgment require further intensive study, organize such further study through committees (assisted where appropriate by rapporteurs and research assistants) or individual research, recommend the allocation of funds made available for these purposes from grants or other sources, and recommend the publication of papers resulting from its work. The Board shall consist of the incumbent President, his two immediate predecessors as President, the Executive Director, and the Editor-in-Chief of the *American Journal of International Law*, all serving *ex officio*, and fifteen other members whose terms shall be five years and who shall normally be ineligible to succeed themselves. At least three of the members shall be selected as persons known for their contributions to disciplines other than law. The Board shall, with the consent of the Executive Council, appoint new members to serve full terms or to fill vacancies in unexpired terms.

## SECTION III. REGULATIONS ON COMMITTEES

1. *General.* The standing committees of the Society, which may function through subcommittees, shall be those described below. With the consent of the Executive Council the President may appoint and dissolve

additional standing committees to deal with substantive problems. All committees shall make annual reports to the President for transmittal to the Executive Council and the Society, and such interim reports as the President or Executive Council may request. Standing committees except the Nominating Committee shall be appointed by the President and, unless otherwise specified, shall be advisory to the President, the Executive Council, and the Society. The President may appoint and dissolve *ad hoc* committees.

2. *Committee on the Budget.* The Committee on the Budget shall advise the Treasurer concerning the investment of the funds of the Society, provide for the annual audit of the financial transactions of the Society and of the books and records pertinent thereto, and advise concerning the ways and means of providing for the financial needs of the Society. The Committee on the Budget shall also advise concerning the equipping and maintaining of the Society's headquarters offices, the preparation of the annual budget, expenditures, and all other matters concerning the administration of the Society's business affairs.

3. *Committee on Corporate Membership.* The Committee on Corporate Membership shall advise concerning ways and means of supplementing the revenues from individual membership dues and from subscriptions. The committee may solicit contributions, including corporate memberships, in support of the general activities of the Society or intended to carry out specific activities in any form agreeable to the donor and consistent with the policies laid down by the Executive Council.

4. *Committee on Financing and Endowment.* The Committee on Financing and Endowment shall advise concerning ways and means of increasing the Society's revenues from foundations and other non-profit institutions, and shall assist the President and the Executive Director in securing grants from such institutions.

5. *Committee on the Annual Meeting.* The Committee on the Annual Meeting shall arrange the program of subjects and speakers for the annual meetings. The committee is authorized to limit the length of papers and speeches.

6. *Committee on Regional and Local Activities.* The Committee on Regional and Local Activities shall promote the organization of regional and local committees in appropriate localities in the United States and assist the regional and local committees to arrange meetings and other activities. The committee may advise the President on contributions to assist such meetings and other activities from funds designated for that purpose in the Society's budget.

7. *Committee on Membership.* The Committee on Membership under the direction of the Executive Council shall by correspondence or other means seek to enroll in the Society persons interested in the activities and purposes of the Society. For this purpose it shall approach members of the legal and teaching professions, diplomatic and government officials, and other groups, so as to obtain the widest membership. The committee's

activities shall also include the extension of the *American Journal of International Law* through subscriptions.

8. *Committee on Student and Professional Development.* The Committee on Student and Professional Development shall promote the interest of the Society in education and professional development in the field of international law and in the education of the public at large. The Committee shall examine educational programs in international law and related subjects and shall make suggestions for their improvement, propose educational and professional activities in which members of the Society might participate, and be available to provide counsel to student international law societies and other groups.

9. *Committee on the Library.* The Committee on the Library shall advise on general policy regarding the library of the Society.

10. *Committee on Tillar House.* The Committee on Tillar House shall advise on the maintenance and use of Tillar House and its furnishings. It may make recommendations to the Executive Council concerning memorials within the House.

11. *Committee on Selection of Honorary Members.* The Committee on Selection of Honorary Members shall recommend to the Executive Council for nomination as an honorary member of the Society a person not a citizen of the United States who has rendered distinguished service in the field of international law proper, namely, one who has made contributions to the science or the history of international law.

The committee shall file its report with the Executive Director of the Society at least three weeks prior to the annual meeting; the report shall state the qualifications upon which the recommendation of the committee is based, and shall within two weeks be sent to each member of the Executive Council for his consideration.

12. *Committee on Annual Awards.* The Committee on Annual Awards shall be responsible for recommending to the Executive Council of the Society not later than March 15 of each year the name of an author (or names if it be a collective authorship) of a work (in the form of a book, monograph, or article) in the field of International Law, which the committee feels deserves the award of the Certificate of Merit of The American Society of International Law. In making its recommendations it shall observe the following rules:

(a) The competition for the award is open to all regardless of nationality or the language or place of publication of the work.

(b) Works to be considered for the award must have been published within a twenty-four-month period preceding February 1 of the year in which the award is to be made.

(c) The author or his publisher shall forward to the Executive Director of the Society, for the committee's use, at 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008, before February 1 of each year not less than three copies of any work which the author or publisher wishes considered for the award.

(d) The committee shall not limit its consideration to works filed with the Executive Director of the Society in accordance with the provisions of paragraph (c) hereof, but may take notice of any other works which shall have been published during the twenty-four-month period preceding February 1 of the year in which the award is to be made.

(e) A majority vote of the committee is sufficient to support recommendation of a work to the Executive Council of the Society. The Executive Director of the Society shall forward the committee's recommendation to the members of the Executive Council. Should there be a dissenting opinion from the committee, the Executive Director of the Society, when forwarding the committee's recommendation, shall set forth the principal arguments of the majority and minority opinions of the committee. A majority vote of the Executive Council at a meeting of the Council shall be decisive as to its recommendation to the Society.

(f) In the event that no two members of the committee can agree on a work published during the period concerned as being sufficiently outstanding to merit the award of the Society, the committee may consider any work in the field of International Law published during a thirty-six-month period preceding February 1 of the year in which the award is to be made. In the event that no work published within such a period meets the standards of the committee, the Chairman shall so report to the Executive Council of the Society, and no award shall be made at the annual meeting of the Society for the year concerned.

(g) The award, if any there be, shall be conferred by the President of the Society in the name of the Society after the approval of the recommendation of the Executive Council by the Society at the annual meeting.

(h) The award shall consist of a framed certificate appropriately printed.

(i) The making of such award by the Society shall not constitute, nor be construed as constituting, adoption by the Society of the views of the author of any work receiving the award.

13. *Committee on the Manley O. Hudson Medal.* The Committee on the Manley O. Hudson Medal shall recommend to the Executive Council from time to time for nomination as a recipient of the gold medal established in the name of the Society by Ralph G. Albrecht a distinguished person of American or other nationality who has contributed to the scholarship and achievement of his time in international law.

A certificate reciting the achievements of the recipient shall be presented with each medal.

The committee shall report at each annual meeting of the Society and recall the terms of the gift, even though no recommendation of an award is made for that year.

14. *Committee on Publications of the Department of State and the United Nations.* The Committee on Publications of the Department of State and the United Nations shall promote the interests of the Society in making avail-

able for educational, professional, and historical purposes, in permanent and accessible form, official texts of treaties and treaty information, diplomatic correspondence, and other documentary material relating to international law and international relations. The committee is authorized to represent the Society, orally or in writing, before appropriate government officials or bodies, on matters within the jurisdiction of the committee and to cooperate with committees of other societies interested in the same purposes.

15. *Nominating Committee.*

(a) The Executive Council, advised by the President, shall make nominations for the Nominating Committee at its meeting next prior to the business session of the annual meeting. Members of the Nominating Committee shall serve through the business session of the next annual meeting.

(b) The Nominating Committee shall draw up a slate of candidates for all elective offices, which shall be notified to members of the Society at least one hundred and fifty days in advance of the annual meeting through suitable publications.

(c) The Nominating Committee shall notify candidates for membership on the Executive Council that the three-year term of the office for which they are nominated begins immediately after the business session of the annual meeting at which the election takes place.

#### SECTION IV. REGULATIONS ON MEETINGS OF THE SOCIETY

##### 1. *Annual Meetings*

(a) The Executive Council shall determine the time and place for the annual meetings of the Society, which shall be held, if possible, in the same place where arrangements are made for holding the annual banquet.

(b) No paper prepared for delivery at an annual meeting of the Society shall be read at such meeting by any person except the writer thereof, unless there be a special resolution of the Executive Council authorizing its reading in the writer's absence. With the exception of those papers for which special authority is given for their reading by some other person, all papers which the authors are unable to read shall be read simply by title.

(c) The printed programs of the Society's meetings shall bear the Seal of the Society and carry the standing committees of the Society.

(d) Any notice published in the *Journal* shall constitute due notice to all members of the Society.

2. *Regional Meetings.* There may be held from time to time, without modifying the program of annual meetings of the Society, regional meetings to discuss problems of international law and relations. Such regional meetings shall be organized by groups of members of the Society, under a regional director appointed for the purpose, in the locality where held, and shall be open to the public if the members so decide. No Society business shall be transacted at such meetings, and no regional meeting shall take any action binding upon the Society.

## SECTION V. REGULATIONS ON PUBLICATIONS

1. *American Journal of International Law*

(a) The Society shall publish as its official organ a periodical entitled *The American Journal of International Law*.

(b) The publication of the *Journal* shall be under the direct supervision of the Editor-in-Chief, who shall have authority in his discretion to make appropriate arrangements with publishers regarding the printing of the *Journal*.

(c) The editing and publication of the *Journal* shall be subject to the following rules and regulations:

(1) There shall be a Board of Editors charged with the general supervision of editing the *Journal* and determining general matters of policy in relation thereto.

(2) The Board shall consist of twenty-four elected members whose terms of office shall be four years. Six members shall be elected by the Executive Council each year, at its meeting next prior to the business session of the annual meeting, from among the members of the Society who have capacity for scholarly production and whose availability and probability of activity qualify them for useful membership on the Board. A member of the Board of Editors who has served on the Board for twelve years after the first election held under the procedures prescribed in this Regulation, as amended, shall not be eligible for election to the Board for one year after the expiry of his term of office. The Executive Council shall have power to elect persons to fill out the unexpired terms of members of the Board of Editors who die, resign, or are unable to serve for any other reason.

At the time of its first election under the procedures prescribed in this Regulation as amended, the Executive Council shall designate which members of the Board of Editors shall serve for one, two, three, and four years respectively.

(3) Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles submitted to the *Journal*.

(4) There shall be an Editor-in-Chief whose term of office shall be four years. The Executive Council shall, when a vacancy occurs, elect the Editor-in-Chief from among the members of the Board at the meeting of the Executive Council next prior to the business session of the annual meeting. The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*. The Executive Council may establish an honorarium to be paid to the Editor-in-Chief and may reimburse him for the expenses incurred in the performance of his duties. In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by one or more of the editors to

be designated by him or by the other members of the Board, who may be likewise compensated and reimbursed.

(5) The staff of the Society shall include an Assistant Editor, who shall be appointed and whose duties shall be determined in co-operation with the Board of Editors; editorial duties in connection with the *Journal* shall be formulated exclusively by the Board of Editors.

(6) The Executive Council may elect annually as honorary members of the Board of Editors present or former members of the Board of long service who have reached the age of sixty-five. Such honorary members shall be in addition to the membership of the Board provided for in paragraph (c) (2) hereof. They shall continue to exercise such editorial functions as they may wish to perform, subject to all other regulations herein prescribed.

(7) The *Journal* shall include leading articles, editorial comments, notes, judicial decisions involving questions of international law, book reviews and notes, a list of books received, and a section of official documents.

(i) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief.

(ii) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of paragraph (c) (8) hereof.

(iii) The department of judicial decisions shall be made up of summaries of judicial decisions rendered by courts in the United States and elsewhere, including international tribunals, extracts from decisions deserving quotation at some length, and the full texts of any decisions meriting such treatment.

(8) The *Journal* shall be published on the 15th day of January, April, July, and October, or as near those dates as possible. The final make-up of each number shall be submitted to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. The Assistant Editor shall proceed, subject to these regulations, with the publication of the *Journal* at such times as may be necessary to insure its appearance on the publication date.

## 2. *Annual Proceedings*

(a) The Society shall also publish yearly the proceedings of its annual meetings. The *Proceedings* shall be published on the 15th day of August or as soon thereafter as possible, and for this purpose there shall be set a time limit within which papers for publication in the *Proceedings* shall be received.

(b) The *Proceedings* shall contain an account of the principal papers read, addresses delivered, and discussion had at the annual meetings, the minutes of the business meeting of the Society, other important reports,



and an adequate index. The Executive Director shall be responsible for the editing and publication of the *Proceedings*.

### 3. *International Legal Materials*

(a) The Society shall publish, once every two months, a collection of current documents involving the international aspects of law, entitled "International Legal Materials," including recent legislation and regulations, treaties and agreements, briefs and decisions in judicial proceedings, official reports, and other official documents from the United States, other countries, and international organizations.

(b) The publication of *International Legal Materials* shall be under the direct supervision of an Editor, appointed by the Executive Council, who shall have authority to designate assistant editors, and, within the limits of funds budgeted for the publication by the Council, to make appropriate arrangements for publication and distribution and to pay reasonable honoraria to translators of documents for publication.

(c) There shall be an Editorial Advisory Committee to advise on editorial policy and the selection of documents for publication.

(1) The Editorial Advisory Committee shall consist of twelve elected members whose terms of office shall be three years. Four members shall be elected by the Executive Council each year, at its meeting next prior to the business session of the annual meeting. Members shall be nominated by the Editorial Advisory Committee, which shall take into account both the professional qualifications of nominees and their ability to take part in meetings in Washington without substantial expense to the Society or burden to the Committee's members. Any member of the Executive Council may also put candidates in nomination.

At the time of its first election under the procedures prescribed in this regulation, the Executive Council shall designate which members of the Editorial Advisory Committee shall serve for one, two, and three years respectively.

(2) The Executive Director and the Director of Studies shall also serve *ex officio* as members of the Editorial Advisory Committee.

### 4. *Subscription Rates*

The Executive Council shall determine the rates of subscriptions and the terms and conditions under which the *Journal* and other publications shall be distributed to subscribers and others.

## SECTION VI. REGULATIONS ON THE OFFICE OF EXECUTIVE DIRECTOR

1. There shall be an Executive Director appointed by the Executive Council to serve at its pleasure.

2. The Executive Director shall devote the major part of his time to the work of the Society, shall assist the President in the performance of his duties, shall assist the committees of the Society in carrying out their functions, and shall perform such other duties as may be assigned to him by the Executive Council. Among other duties, the Executive Director, in con-

sultation with appropriate committees, shall make recommendations to the President and Executive Council concerning the composition of the staff, program, and budget of the Society and shall make an annual report.

3. The Executive Director shall appoint the staff of the Society, whose duties and terms of service he shall determine within a staffing pattern and budget authorized by the Executive Council. Within the approved budget, he may appoint temporary consultants or employees to assist in the execution of his duties.

4. The Executive Director shall receive notice of all meetings of the Executive Council, the Executive Committee, and all committees of the Society.

5. It shall be the duty of the Executive Director to attend meetings of the Executive Council and Executive Committee of the Society (except when the conduct of his office and terms of his appointment are considered).

6. The Executive Director may attend the meetings of all committees of the Society.

7. The position of Executive Director may be held by an elected officer of the Society, who may be designated Executive Vice President.

#### SECTION VII. REGULATIONS ON THE OFFICES OF THE SOCIETY

1. The Society shall maintain an office in the District of Columbia as its principal office and may maintain offices in such other places as may be determined by the Executive Council from time to time.

2. The office of the Society in the District of Columbia shall be under the immediate direction and supervision of the Executive Director.

#### SECTION VIII. REGULATIONS ON BUDGET AND FINANCE

1. The expenditures of the Society shall be controlled by the annual budget adopted by the Executive Council. The Executive Director, under the direction of the President and in consultation with the Editor-in-Chief of the *Journal*, the Treasurer, and the Committee on the Budget, and such other committees as may be appropriate, shall prepare the proposed annual budget for submission to the Executive Council.

2. The proposed annual budget shall include estimates of the main items of expenses by major categories, including the staff, the *Journal*, other publications, library, maintenance of the headquarters, supplies and equipment, travel, meetings, and consultants. The annual budget as approved by the Executive Council shall regulate all expenditures for the fiscal year concerned. The Executive Committee is empowered to authorize adjustments in the annual budget within the total authorized by the Executive Council.

3. On behalf of the Society the Executive Council may receive gifts or grants limited by the donor for specific purposes outside the regular budget and authorize expenditure of such gifts or grants, delegating such responsibility as it shall consider appropriate to the officers and Executive

**Director.** Such authorizations of receipts and expenditures shall be considered as amendments to the approved annual budget. This provision shall not apply to gifts or grants for the general purposes of the Society.

4. The Executive Director, or in his absence or disability such other person as the President or Executive Council may designate, shall be authorized to incur obligations on behalf of the Society within the amounts authorized for expenditure in the approved annual budget.

5. *Reserve Funds.* Funds not currently needed for expenditures under the approved annual budget and any other funds, except the investment fund provided by Regulation 6 of this Section, shall be kept by the Treasurer, at his discretion, in Federally insured savings accounts, or shall be invested by him in stocks or securities. The Treasurer may transfer from such savings accounts or investments to the checking account or accounts funds required to meet expenditures authorized by the approved annual budget.

6. *Investment Fund.* The Treasurer shall invest all payments received pursuant to Regulation 4 (a) of Section I and keep the same as a permanent fund, the income from which shall be devoted to the interests of the Society. To the extent practicable, he shall keep such funds invested in stocks and securities. He is authorized, in his discretion, to sell any stocks and securities which are now or may become part of the investment fund and to reinvest the proceeds. He may keep a reasonable amount in Federally insured savings accounts.

7. *Checking Accounts.* The Treasurer shall maintain one or more checking accounts in a bank or banks approved by the Executive Council, in which funds of the Society which are not deposited or invested under Regulations 5 and 6 of this Section regarding reserve and investment funds shall be deposited and kept, subject to checks drawn in the name of the Society by its Treasurer, Assistant Treasurer, Executive Director, Director of Studies, or the Chairman of the Committee on the Budget. Any check so drawn by the Executive Director or the Director of Studies shall bear the countersignature of the Treasurer, the Assistant Treasurer or the Chairman of the Committee on the Budget if the amount thereof is greater than \$500.00. The Executive Director shall promptly at the end of each month communicate to the Treasurer a memorandum of all deposits in and withdrawals from the account during the month.

8. *Safe Deposit Box.* The Treasurer is authorized and directed to contract in the name of the Society for continued use of a suitable safe deposit box in a bank in Washington, D. C.

It shall be provided in and by such contract that access to the contents of such box may be had only by not less than any two of the incumbents for the time being of the office of President, of Treasurer, of Assistant Treasurer, and of Secretary, or by the Treasurer or Assistant Treasurer and any one of the members of the Committee on the Budget. The Secretary shall immediately after adjournment of the annual meeting certify to the bank in which the safe deposit box is located, under seal of the Society and countersignature of the President, the names of the incumbents of

each of the above-mentioned offices and of the members of the Committee on the Budget.

Such certificate shall be accompanied by all requisite signature or other cards of identification.

9. The Treasurer, Assistant Treasurer, or Chairman of the Committee on the Budget is each authorized to pay bills approved by the Executive Director, or in case of the absence or disability of the Executive Director, such other person as the President or Executive Council may designate, within the amounts authorized for expenditure in the approved annual budget. The Executive Director or, in his absence or disability, the Director of Studies, is authorized to pay bills not exceeding \$500.00 in amount and within the limits authorized for expenditure in the approved annual budget.

10. The Treasurer shall submit such financial reports as the Executive Council shall request. He shall also submit an annual financial report to the Society at the annual meeting, which report shall cover the fiscal year beginning on the first day of April in each year.

11. The Treasurer shall submit such periodic financial reports as may be required by persons or institutions making grants or gifts to the Society, or by agencies of the Federal, State, or municipal governments.

12. The Assistant Treasurer shall perform all the functions described above in case of the absence or disability of the Treasurer, and may at any time and from time to time perform any of said functions upon being thereunto authorized and directed by the Treasurer.

#### SECTION IX. REGULATIONS ON NUMBER OF HONORARY VICE PRESIDENTS

The number of Honorary Vice Presidents shall be sixteen.

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[Abbreviations: *Ad*, address; *AJIL*, American Journal of International Law;  
*ASIL*, American Society of International Law; *Rem*, remarks.]

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